2005

Robert D. Irvine, an individual v. Sharon Craig Anderson and Colleen Craig Anderson, individuals : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS
STATE OF UTAH

ROBERT D. IRVINE, an individual, Plaintiff and Appellee, v. SHARON CRAIG ANDERSON and COLLEEN CRAIG ERICKSON, individuals, Defendants and Appellants.	Appellate Case No. 20050138-CA

BRIEF OF APPELLANTS

Appeal from Judgment Entered December 6, 2004, by the Honorable Timothy R. Hanson of the Third Judicial District Court, Salt Lake County, State of Utah

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STATEMENT OF JURISDICTION

Appellants Sharon Craig Anderson and Colleen Craig Erickson ("Appellants") appeal a final Judgment of the Third Judicial District Court, Salt Lake County, State of Utah, in favor of Appellee Robert D. Irvine ("Appellee Irvine"). The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. §78-2a-3(2), this matter having been transferred to the Court of Appeals by the Utah Supreme Court.

STATEMENT OF ISSUES FOR REVIEW AND STANDARD OF REVIEW

Issue 1. Whether the trial court erred in finding that a deed executed in 1981 created both an exclusive life estate and a joint tenancy interest in real property in the grantor under the deed. The standard of review for this issue, as a conclusion of law, is that the trial court's findings be accorded no particular deference by the appellate court, but that they be reviewed for correctness.Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992); Wade v. Stangl, 869 P.2d 9, 12 (Utah App. 1994).

Issue 2. Whether the trial court, having found that a 1981 deed created both an exclusive life estate and a joint tenancy interest in the grantor of the real property, erred in denying cotenants an accounting for profits and expenses of the Property from the other cotenants. The standard of review for this issue, as a conclusion of law, is that the trial court's findings be accorded no particular deference by the appellate court, but that they be reviewed for correctness. Trujillo v. Jenkins, 840 P.2d 777, 778-79 (Utah 1992); Wade v. Stangl, 869 P.2d 9, 12 (Utah App. 1994).

Issue 3. Whether the trial court erred in appointing Appellee Irvine as receiver of the Property. The standard of review for this issue, as a conclusion of law, is that the trial court's findings be accorded no particular deference by the appellate court, but that they be reviewed for correctness. Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991).

DETERMINATIVE STATUTORY PROVISIONS

The following statutory provisions are determinative or of central importance to this appeal:

> Utah Code Ann. §57-1-3: "A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended."

STATEMENT OF THE CASE

Nature of the Case

Appellants appeal a final Judgment of the Honorable Timothy R. Hanson of the Third Judicial District Court of Salt Lake County, State of Utah. This action arises under common law and statutory interpretation.

Appellants will show (1) that Appellee Irvine is not entitled to a one-third interest as tenant in common in certain real property (the "Property"); (2) that, if Appellee Irvine is entitled to an interest in the Property, he must account to his cotenants for profits and expenses of the Property received or incurred by him; and (3) that Appellee Irvine may not be appointed receiver of the Property.

Appellants are entitled to have their title to the Property quieted from any claim of Appellee Irvine and are entitled to an accounting from Appellee Irvine for all profits and expenses of the Property received or incurred by him. Therefore, this Court should find that the trial court erred in awarding Appellee Irvine an interest in the Property, in denying Appellants an accounting from Appellee Irvine and in appointing Appellee Irvine receiver of the Property,

Course of the Proceedings and Disposition Below

Appellee Irvine brought suit against Appellants requesting (i) that the trial court partition the Property among the parties according to their respective rights; (ii) that the trial court order the sale of the Property and the division of the proceeds among the parties according to their respective rights; (iii) that the trial court enjoin Appellants [Defendants] from management of the Property; and (iv) that the trial court appoint a receiver for the Property in accordance with Utah R. Civ. P., Rule 66(b).

Appellants answered the allegations of the Complaint denying the same and brought their counterclaim alleging: (1) that Appellee Irvine's ownership, if any, in the Property was extinguished upon the death of Ada Craig; (2) that Appellants are entitled to an accounting from Appellee Irvine during such periods for which he exercised control over the Property; and (3) that Appellants are entitled to judgment against Appellee Irvine for profits from and damages to the Property during such period for which he exercised control over the Property.

Appellee Irvine answered the allegations of the Appellants' Counterclaim denying the same.

The matter was tried before the Honorable Timothy R. Hanson on September 28-29, 2004. The trial court rendered its decision orally in court on October 14, 2004. The Judgment of the trial court was entered on December 6, 2004. The trial court awarded Appellee Irvine a one-third interest as tenant in common in the Property with the remaining two-thirds held by Appellants; appointed Appellee Irvine receiver of the Property to sell the Property and divide the proceeds equally amount the owners; and awarded Appellee Irvine his costs.

Appellants filed their Motion for Reconsideration on November 10, 2004. A Minute Entry denying that motion was entered on December 9, 2004.

Appellants filed their Rule 59(e) Motion to Alter or Amend Judgment on December 20, 2004. A Minute Entry denying the Motion was entered on January 13, 2005.

Appellants filed their Notice of Appeal on February 22, 2005. Appellants appeal the trial court's decision and ask this Court to reverse the trial court.

Statement of Facts

At the beginning of 1981, Ada Craig was the sole owner of real property located at 251 East 1700 South, Salt Lake City, Utah (the "Property").

On or about January 19, 1981, Ada Craig conveyed the Property to Appellants by quitclaim deed, subject to a retained life estate (the "1981 Deed"). Plaintiff's Exhibit 1.

The 1981 Deed states as follows: "Ada R. Craig ... hereby quit claims to Ada R. Craig, Sharon V. Craig [Sharon Craig Anderson] and Colleen R. Craig [Colleen Craig

Erickson] as Joint Tenants with full rights of survivorship and not as tenants in common, reserving a Life Estate only for Ada R. Craig...." Plaintiff's Exhibit 1.

On February 6, 1996, Ada Craig executed her last will and testament (the "1996 Will"). See Defendants' Exhibit 19.

In the 1996 Will, Ada Craig devised and bequeathed her estate in equal shares to Appellants, and specifically omitted any provision for her other children. The last paragraph of Article Fifth of the 1996 Will states: "I have intentionally and with full knowledge omitted any provision for Robert Douglas Irvine [Appellee Irvine], Raymond Walker Irvine, Carolyn Kay Irvine Abbott [Carolyn Abbott], and Mark Albert Craig."

On or about January 21, 1999, Ada Craig conveyed all of her interest in the Property to Carolyn Abbott by quitclaim deed (the "1999 Abbott Deed").

From approximately June 1999 until July 2003 Appellee Irvine assumed and maintained sole management and control of the Property.

On or about May 20, 2002, Carolyn Abbott conveyed her interest in the Property to Appellee Irvine by Warranty Deed (the "2002 Irvine Deed").

Ada Craig died on July 11, 2003.

SUMMARY OF ARGUMENTS

1. The trial court erred in finding that the 1981 Deed created both an exclusive life estate and a joint tenancy interest in Ada Craig. An exclusive life estate is a present estate in real property while a joint tenancy is the concurrent ownership of a present estate in real property. These two estates are incompatible and cannot exist in the same property at one and

the same time. Ada Craig's intent in the 1981 Deed was to convey the Property to the Appellants upon her death. Therefore, this Court should find that upon Ada Craig's death, the Property vested exclusively in the Appellants.

2. The trial court erred in denying Appellants an accounting for profits and expenses of the Property from their cotenants. Each cotenant is a fiduciary with regard to the remaining cotenants. Appellants are entitled as a matter of right to an accounting from Appellee Irvine who asserted that he was a cotenant. Therefore, this Court should find that Appellants are entitled to an accounting for their cotenancy.

3. The trial court erred in appointing Appellee Irvine receiver of the Property. Rule 66(b), addresses the appointment of a receiver. Rule 66(b) states that no party to an action shall be appointed receiver without the written consent of all parties to the action. Appellants did not consent, in writing or otherwise, to the appointment of Appellee Irvine as receiver. Therefore, this Court should find that Appellee Irvine may not be appointed receiver with respect to the Property.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FINDING THAT THE 1981 DEED CREATED BOTH AN EXCLUSIVE LIFE ESTATE AND A JOINT TENANCY INTEREST IN THE GRANTOR.

Appellants asked the trial court for an interpretation of the 1981 Deed finding that Appellants are the sole owners of the Property. The trial court instead found that the 1981 Deed created both an exclusive life estate in Ada Craig and a joint tenancy among Ada Craig, Sharon and Colleen.

The Appellants argue and ask this Court to find that a grant of both an exclusive life estate and a joint tenancy interest by the 1981 Deed are inconsistent and incompatible interests. Appellants ask this Court to reconsider the 1981 Deed in this light. Construction of the 1981 Deed consistent with the trial court's ruling and findings regarding Ada Craig's intent will result in finding that Ada Craig retained a life estate, with a remainder interest in Appellants.

Estates in Real Property

Estates in real property may be considered in two classes: present estates and future estates. The 1981 Deed purports to create two separate present estates: first, to convey the Property to Ada Craig, Sharon and Colleen as joint tenants with rights of survivorship, and second, to reserve an exclusive life estate only for Ada Craig. For the reasons put forth by Appellants at trial, and reiterated here, the two actions which the 1981 Deed purports to accomplish are fundamentally incompatible and cannot coexist in real property.

Concurrent estates are a division of real property ownership separate and distinct from the division into present and future estates. A concurrent interest is a present interest and exists whenever two or more persons have a concurrent and equal right to the possession and use of the same parcel of land. At common law there were five types of concurrent estates, three of which survive for all practical purposes today and one of which concerns us in this matter: the joint tenancy.

"Joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. A joint tenancy is concurrent ownership of an estate in fee simple, fee-tail, for

life, for years, or at will, arising by grant to two or more persons." Black's Law Dictionary 5th Edition, page 1313. The estates referred to in this definition are all present estates and not future estates. A joint tenancy is concurrent ownership of a *present* [emphasis added] estate arising on the date of grant. A joint tenancy cannot be concurrent ownership of a future estate because the unities of joint ownership must be determined on the date of grant, not at some future date when the estate vests. Future estates such as remainders, reversions and executory interests are not held in joint tenancy.

The 1981 Deed purports to grant concurrent ownership of an estate to Ada Craig, Sharon and Colleen. If the concurrent estate granted by the 1981 Deed is a present estate, it cannot coexist with an exclusive life estate. On the other hand, if the concurrent estate granted by the 1981 Deed is a future estate, it cannot by definition be held in joint tenancy. The trial court is unclear on this issue, stating on the one hand that "[T]he joint tenancy relationship means that all the joint tenants enjoy the property in its totality. They all have the right to enjoy the property in its entirety." While on the other hand stating "[A] life estate gives a person control over property for their life." A joint tenant cannot enjoy a property in its totality if a life tenant controls the property. Thus, if a joint tenancy and a life estate are to coexist as the trial court attempts to construe the 1981 Deed, then either the life estate or the joint tenancy must be less than the law makes them out to be.

The arithmetic of real property is such that the sum of all of the interests equals a fee simple absolute. A life estate is a present estate which demands a future interest, whether by reverter, remainder or executory interest. A joint tenancy is a present estate held by concurrent ownership, with a built-in future interest in the survivor of the joint tenants.

Taken together, a life estate and a joint tenancy overlap and conflict with one another. The sum of the parts created by the 1981 Deed cannot be more or less than the whole of the interests in the Property. Thus, the trial court's finding that the 1981 Deed created both an exclusive life estate in Ada Craig and a joint tenancy in Ada Craig, Sharon and Colleen is flawed.

If the terms "joint tenants" and "life estate" cannot be given their fair meanings without conflicting with one another, than the parties' intent is to be considered. The 1981 Deed must be interpreted to give effect to Ada Craig's intent as found by the trial court.

Ada Craig's Intent

If the 1981 Deed is not clear on its face, the court looks to the intent of Ada Craig to determine the construction of the 1981 Deed. The Appellants ask this Court to reconsider its ruling in light of Ada Craig's intent. The trial court found "... that in 1981, Ada Craig wanted to have her house in which she held the sole interest go to her two daughters, Sharon and Colleen, upon her death." The trial court also found "... that Ada Craig intended to keep control and some ownership interest in her home, the property in question , until she died."

If the trial court had interpreted the 1981 Deed in a manner consistent with the trial court's findings regarding Ada Craig's intent, then the trial court would have found that the 1981 Deed created a present estate in Ada Craig for her life, a future estate in the form of a remainder in Sharon and Colleen, if they survive Ada Craig, and a possibility of reverter in Ada Craig and her heirs if both Sharon and Colleen predecease her. This interpretation is consistent with the arguments put forth by the Appellants at trial. Indeed, any other finding would defeat Ada Craig's intent.

The trial court suggested that a reason for Ada Craig having retained a joint tenancy interest in the Property was that in the event Sharon or Colleen predeceased Ada Craig, the Property would not go to their heirs. This is a presumption at best, given that no evidence of that was presented at trial. In addition, this rationale fails to recognize the legal point that any one of the joint tenants had the ability to sever the joint tenancy and to make their interest in the property transferable to their heirs or to a third party. In fact, this is exactly what resulted from the 1999 quitclaim deed to Carolyn Abbott; the trial court found that Carolyn Abbott received a 1/3 interest as tenant in common and not as a joint tenant. If Ada Craig really intended to preclude Appellants' heirs from obtaining an interest in the Property should they predecease her, a retained joint tenancy interest was not the way to accomplish that. In an attempt to address a condition that never occurred, that is that one of the Appellants might predecease Ada Craig, the trial court created a right for Ada Craig that was never intended, that is that Ada Craig conveyed less than all of the Property to Sharon and Colleen in the 1981 Deed.

Ada Craig intended to convey 100% of the Property to Sharon and Colleen. Whether Ada Craig intended to do so at the time of the 1981 Deed or at the time of her death doesn't really matter. The trial court found that this was Ada Craig's intent in 1981 and the evidence supports that as her intent at least until 1996 when she affirmed her intent in the 1996 Will. In the 1996 Will Ada Craig specifically devised and bequeathed her estate to the Appellants and specifically disinherited her other children, including Carolyn Abbott and Appellee Irvine.

This Court should interpret the 1981 Deed to give effect to Ada Craig's intent at the time she executed the deed in 1981, not her intent or state of mind as it might have been in 1999. It is true that Ada Craig executed the 1999 Abbott Deed and that it was probably an expression of her intent in 1999. But that intent is irrelevant to an interpretation of the 1981 Deed.

Ada Craig retained control of the property during her lifetime with her life estate. As the Appellants argued with case law, statutory analysis and commentary, the 1981 Deed gave Ada Craig only a life estate and Appellants ask this Court to so find.

Additional Analysis Supporting Appellants' Ownership of the Property

Appellants assert that the 1981 Deed created only a life estate in the Property for Ada Craig. The joint tenancy language of the 1981 Deed as it relates to Ada Craig should be disregarded. A joint tenancy is a concurrent estate. A joint tenancy depends upon "four unities:" the unities of time, title, interest and possession. The unity of time means that the interests of the joint tenants must arise at the same time. The unity of title is present only if the interests are acquired by the same instrument. The unity of interest means that the tenants acquired identical interest, that is, in fee simple absolute or otherwise. The unity of possession means a common right of possession and enjoyment.

If one joint tenant conveys his interest to a third party, the recipient acquires an interest as tenant in common with the remaining joint tenants, who, if more than one, continue as joint tenants among themselves. Such a conveyance is said to "sever" the joint tenancy as to the transferring party by removing the unities of time and title. Utah Code Ann.

§57-1-5(5). The important consequence of a severance is that the right of survivorship is destroyed between the original tenants and the new tenant.

Ada Craig, the decedent, purported to create a joint tenancy among herself and her two daughters, the Appellants, pursuant to the 1981 Deed. The 1981 Deed states in relevant part that Ada Craig quitclaims to,

> "... ADA R. CRAIG, SHARON V. CRAIG [Anderson] and COLLEEN R. CRAIG [Erickson] as Joint Tenants with full rights of survivorship and not as tenants in common, reserving a Life Estate only for ADA R. CRAIG ..."

in the subject Property. The language of the 1981 Deed contains both a granting clause and a habendum clause. "A granting clause is that portion of the deed or instrument of conveyance which contains the words of transfer of a present interest." Black's Law Dictionary 5th Edition, page 630. The granting language of the 1981 Deed conveys present title to the Property to Ada Craig and to her two daughters "as Joint Tenants with full rights of survivorship and not as tenants in common,...."

> "A habendum clause is the clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee. The office of 'habendum' is properly to determine what estate or interest is granted by the deed, though office may be performed by the premises, in which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises." Black's Law Dictionary 5th Edition, page 639.

The restrictive or habendum language of the 1981 Deed states that it is "reserving a Life Estate only for ADA R. CRAIG...." In its Minute Entry Decision and Order relating to a Motion for Summary Judgment in this matter, the trial court observed that the interpretation

of the habendum language "reserving a Life Estate only for ADA R. CRAIG" is the crux of the disagreement between the parties.

A. If traditional construction is applied, the habendum language restricts the granting language. Therefore, each of the three parties to the 1981 Deed received a joint tenancy interest in the Property, but Ada Craig's joint tenancy interest was restricted to a life estate only by the habendum clause, that is she was precluded from severing her joint tenancy interest and conveying anything more than her life estate.

B. Looking to case law, no Utah case has been decided on this point. However, an analogous situation was considered by the Court of Appeals of North Carolina in Robinson v. King, 314 S. E. 2d 768 (N.C.App. 1984). In that case the grantor conveyed property to his sister by quitclaim deed. The relevant part of the quitclaim deed states, "... [grantors] have granted, bargained, sold and released, and by these presents do bargain, sell and release unto the said Maggie Robinson [the grantor's sister] all our right, title and interest in and to [the property].... To have and to hold, all and singular, the said premises before mentioned, unto the said Maggie Robinson, *for and during the term of her natural life* [emphasis added]." Robinson, *supra*, 314 S. E. 2d at 770.

The North Carolina court noted that the granting clause of the quitclaim deed, standing alone, appears to give Maggie Robinson a fee simple estate, while the habendum clause, standing alone, appears to give her a life estate. Robinson, *supra*, 314 S. E. 2d at 769.

This observation is similar to the instant case. The granting clause of the 1981 Deed, standing alone, appears to give Ada Craig a joint tenancy interest in a fee simple estate, while

the habendum clause of the 1981 Deed, standing alone, appears to give to Ada Craig a life estate.

In Robinson, the defendants, being the proponents of a fee estate in the sister, presented evidence that the sister thought that she owned the property and that she attempted to convey the property by will. Robinson, *supra*, 314 S. E. 2d at 770.

In the instant case, Appellee Irvine alleges that Ada Craig thought that she owned a concurrent fee simple estate in the Property and that she attempted to convey that interest in the Property.

In Robinson, the North Carolina court found that the quitclaim deed should be interpreted to convey a life estate only to the sister and not a fee estate. The North Carolina court based its analysis on the relevant North Carolina statute, G.S. 39-1 which states:

> When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. Robinson, *supra*, 314 S. E. 2d at 771.

The Robinson court held that "[U]nder G.S. 39-1, the absence of words of inheritance, combined with the presence of language limiting the estate to the term of the grantee's life, should be interpreted to convey a life estate." The Robinson court noted that "[T]his result has been reached in other jurisdictions where a grant 'to A,' which standing alone would convey a fee, has been held to convey a life estte [sic] when the granting clause is accompanied by a habendum clause which refers to a life estate." Robinson, *supra*, 314 S. E. 2d at 771. *See* 4 H. Tiffany, *The Law of Real Property* §980 (3d. Ed. 1975).

The similar statute in the Utah Code is found at Utah Code Ann. §57-1-3 and states: "A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended." In the instant case, the 1981 Deed makes reference to a concurrent fee simple title being conveyed in the granting clause, but it is also apparent from the language of the 1981 Deed that a lesser estate for Ada Craig was intended.

C. A supporting interpretation is expressed in legal commentary which states that "[W]hen language in a deed or will would otherwise be effective to create a life estate but also contains additional language creating in the transferee a power, either limited or unlimited, to dispose of the land in fee simple, the prevailing rule in the United States is that the transferee has only a life estate despite the added power." Roger A. Cunningham, William B. Stoebuck and Dale A. Whitman, The Law of Property 67-68 (1993). Applying this analysis to the instant case, the 1981 Deed clearly creates a life estate in Ada Craig, the transferee, both through the express language and through the joint tenancy. In simplest terms, a joint tenancy is a life estate coupled with the power to sever the joint tenancy to create a life estate and a remainder interest. If the 1981 Deed is construed to create in Ada Craig a life estate, which it does by the granting clause and the habendum clause, together with the ability to create a remainder interest, then pursuant to the foregoing, the prevailing rule of construction would hold that Ada Craig had only a life estate, despite any additional ability to create a remainder interest.

In light of the foregoing, this Court should find that Ada Craig's interest in the Property was a life estate only and that upon her death, the Property vested in the Appellants.

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' AN ACCOUNTING FOR PROFITS AND EXPENSES OF THE PROPERTY FROM THEIR COTENANTS.

Each cotenant in real property is a fiduciary with regard to the remaining cotenants. Webster v. Knop, 6 Utah 2d 273, 312 P.2d 557 (1957); *also* McCready v. Fredericksen, 41 Utah 388, 126 P. 316 (1912).

The doctrine of merger really has nothing to do with the reconciliation of incompatible estates. If the estates are incompatible, then the 1981 Deed must be interpreted to give effect to the intent of the Ada Craig, the grantor. However, the Trial court ruled based upon a finding that Ada Craig's life estate and the joint tenancy estates of Ada Craig, Sharon and Colleen are compatible and are separate, recognizable estates and therefore the issue of merger must be considered.

Commenting on the issue of merger, the trial court noted that "[T]o the extent that one might say that a life estate and the joint tenancy estate in these circumstances are incompatible, I am of the opinion that because the joint tenancy estate is the greater estate, that the life estate would merge into it."

The merger of property interests is defined as follows: "It is a general principle of law that where a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, sunk or drowned, in the greater." Black's Law Dictionary 5th Edition, page 892.

The trial court denied the Appellants' claim for an accounting, presumably on the premise that the Appellants' interest in the Property was not a present interest but was subject

to Ada Craig's life estate. However, when Ada Craig conveyed all of her interest in the Property to Carolyn Abbott with the 1999 Abbott Deed, Ada Craig's interests, whatever the trial court may have interpreted them to be, were merged in Carolyn Abbott and the Appellants' interests in the Property, regardless of how the trial court may have subordinated them the exclusive life estate of Ada Craig, became a present interests.

Based on the foregoing, the Appellants' interests in the Property became present interests on the date of the 1999 Abbott Deed, if not before. Appellants are entitled as a matter of right to an accounting from the date that their interests in the Property became present interests. Appellants have asserted that from the time of Ada Craig's readmission to the care center in January 1999 until her death in July 2003 they were excluded from the management of the Property and provided no accounting of the profits or expenses of the Property.

Appellants urge this Court to acknowledge their present interest in the Property at least from the date of the 1999 quitclaim deed, if not before, and to award them their rights with respect to the Property by ordering Carolyn Abbott and Appellee Irvine to provide them with an accounting from the date of their present interest.

III. THE TRIAL COURT ERRED IN APPOINTING APPELLEE IRVINE AS RECEIVER OF THE PROPERTY.

In its ruling, the trial court appointed Appellee Irvine, the plaintiff in this matter, "... to act as receiver of the property, to undertake the sale of the property, ..." Appellants object to Appellee Irvine's appointment as receiver and urge this Court to reconsider the appointment of Appellee Irvine as receiver. Appellants ask this Court to consider Utah R.

Civ. P., Rule 66 (b), which reads as follows: "Appointment of receiver. No party or attorney to the action, nor any person who is not entirely impartial and disinterested as to all the parties and the subject matter of the action can be appointed receiver therein without the written consent of all interested parties."

Appellants have not consented in writing or otherwise to the appointment of Appellee Irvine as receiver, as required by Rule 66(b), and because of reservations which they have regarding such appointment they have declined to do so. Therefore, this Court should overturn the appointment of Appellee Irvine as receiver.

The trial court awarded Appellee Irvine a 1/3 ownership in the Property. The Appellants have a 2/3 ownership in the Property. Notwithstanding Rule 66(b), it is contrary to the principles of equity to award a minority interest owner control over the Property. Appellee Irvine's appointment as receiver for the Property should be overturned.

CONCLUSION

An exclusive life estate is a present estate and a joint tenancy interest is the concurrent ownership of a present estate. A life estate and a joint tenancy are incompatible. Statute, case law and commentary lead to a reconciliation of the two with a finding that Ada Craig's interest in the Property resulting from the 1981 Deed was solely a life estate. In addition, if was the obvious intent of Ada Craig at the time of the 1981 Deed that she retain only a life estate. Therefore, upon the death of Ada Craig, her life estate terminated and the Property vested in Appellants, and this Court should so find.

If this Court finds that Ada Craig retained some interest in the Property by the 1981 Deed which extended beyond her lifetime, then under the principles of merger, her claim to

a life estate was extinguished and nonexistent and Appellants are entitled to an accounting for their interest in the Property from the date of the 1981 Deed or at least from the date of the 1999 Abbott Deed in which the interests merged in Carolyn Abbott, and this Court should so find. If this is the finding of this Court, then the matter should be remanded to the trial court for additional findings relating to an accounting for the Property.

Utah R. Civ. Proc., Rule 66(b) bars Appellee Irvine from being the receiver of the Property, and this Court should so find.

ADDENDUM

No Addendum is necessary in this appeal.

DATED September 9, 2005.

SWENSEN & ANDERSEN PLLC

James G. Swensen, Jr.
Attorney for Defendants and Appellants

CERTIFICATE OF SERVICE

I certify that on September 19, 2005, I caused a true and correct copy of the foregoing BRIEF OF APPELLANT to be mailed, postage prepaid, to:

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THIRD DISTRICT COURT, SALT LAKE DIVISION

SALT LAKE COUNTY, STATE OF UTAH

ROBERT D. IRVINE,	)	
Plaintiff,	)	COMPLAINT
vs.	)	
	)	Case No. 030920001
SHARON CRAIG ANDERSON and COLLEEN CRAIG ERICKSON,	)	JUDGE Hanson
Defendants.	)	

COMES NOW the Plaintiff and complaints of the Defendants and for cause of action alleges as follows:

1. This is an action to partition certain real property, more particularly hereinafter described, pursuant to the provisions of § 78-39-1, *et seq.*, Utah Code Annotated (1953, as amended).

2. Plaintiff and Defendants are residents of Salt Lake County, Utah.

3. The real property which is the subject of this litigation is situate in Salt Lake County, Utah, and is more particularly described as follows:

16-18-181-013 Commencing 272.25 feet West from the Southeast corner of Lot 1, Block 12, 5 Acre Plat "A", Big Field Survey; thence West 66 feet; North 170.1 feet; East 66 feet; South 170.1 feet to the point of beginning.

4. On January 19, 1981, Ada Craig executed a quit claim deed to the above-described property conveying the same to herself, Sharon V. Craig (nka Sharon Anderson) and Colleen R. Craig (nka Colleen Erickson), as joint tenants, subject to a life estate in Ada Craig. Said deed was recorded on January 19, 1981, in Book 5202 at Page 1168, as Entry No. 3525030, in the office of the Salt Lake County Recorder.

5. On January 21, 1999, Ada Craig conveyed her interest in the subject property to Carolyn Abbott also subject to a life estate by quit claim deed recorded January 28, 1999, in Book 8241 at Page 2974 Entry No. 7237662 in the office of the Salt Lake County Recorder. The interest of Carolyn Abbott was subsequently conveyed to the Plaintiff herein by quit claim deed dated May 20, 2002, and recorded June 3, 2002, in Book 8605 at Page 1545 as Entry No. 8251901 in the office of the Salt Lake County Recorder.

6. Plaintiff is the owner of an undivided one-third interest in the subject property.

7. Defendants are the owners as joint tenants of the remaining two-thirds interest in the subject property.

8. Ada Craig is the parties' mother and is now deceased.

9. There are no liens or encumbrances appearing of record on the property, and Plaintiff has no knowledge of any parties who claim an interest in the property or who will be materially affected by this action other than these parties.

10. Plaintiff has obtained a title report from Sutherland Title Company, and such report is located at the offices of the attorney appearing hereon and may be used, inspected and copied by the parties to this action.

11. During the last years of Ada Craig's life, Plaintiff assisted her in the management of the property as rental units, using the proceeds therefrom to pay the expenses on the property and pay a portion of Ada Craig's care and support.

12. Plaintiff and Defendants have been unable to agree on the operation or disposition of the property since some time prior to the death of Ada Craig, and in fact, as the result of the dispute between the parties, the property is now vacant.

13. Plaintiff has approached the Defendants requesting that they either purchase his interest therein or consent to the sale of the property with a division of the proceeds between them.

14. Defendants have refused Plaintiff's request and have refused to cooperate with Plaintiff in the management and care of the property.

15. Plaintiff has no objection to maintenance and necessary repairs to the premises to ready it for sale, but does not wish to become involved in or pay for extensive or unnecessary work to the property.

16. Defendants have undertaken an effort to deny Plaintiff a rightful interest in the title to the subject property, including the filing of a false affidavit with the Salt Lake County Recorder's Office which asserts that Defendants are the sole title holders to the property.

17. Defendants have further caused the locks to be changed on the premises for the purpose of preventing Plaintiff from entering the premises and otherwise asserting possession as an owner thereof.

18. Without cause and without the approval or participation of Plaintiff, defendants caused a three-day notice to quit to be served upon the only tenant on the property, resulting in the vacating of said property by the tenant and loss of further income.

19. Such effort on the part of Defendants to deny Plaintiff his interest in the title to the subject property and rightful benefits as an owner thereof has been made by Defendants in bad faith with an intentional effort to deprive Plaintiff of a property interest legally and rightfully belonging to him as evidenced by valid conveyances on record with the Salt Lake County Recorder's Office.

20. Such bad faith on the part of Defendants has necessitated the filing of this complaint by Plaintiff, and Plaintiff is entitled to relief under § 78-27-56, Utah Code Annotated (1953, as amended) including his costs, expenses and attorney fees incurred in bringing this action and in defending his rightful interests in the subject property.

21. The dispute between the parties is ongoing and to undertake any control of the premises without the participation of the Plaintiff will further the dispute and antagonism between the parties.

22. Due to the disruptive nature of the relationship between the parties, Plaintiff believes that the property is in danger of material damage, abuse or neglect unless a receiver is appointed to take and keep possession of the property, to receive the rents, to collect debts, and generally do such acts respecting the property as the court may authorize during the pendency of this litigation.

23. In order to bring the dispute between the parties to an end, Plaintiff is informed and believes and alleges that a partition by sale of the property, rather than a physical division thereof, is more equitable to the parties in that although the property in question contains a number of rental units, it was originally constructed as a single family residence and the physical partition and apportionment and distribution of rents and expenses will be impossible.

24. In the event that Defendants persist in their efforts to assert sole control of the premises without Plaintiff's consent and participation, Plaintiff requests that the court issue an injunction enjoining and restraining the Defendants from incurring further expenses on the property or taking income therefrom, if any, during the pendency of these proceedings.

WHEREFORE, Plaintiff requests:

1. That Defendants and each of them appear and answer this Complaint.

2. The court decree partition of the above-described real property among the parties hereto according to their respective rights.

3. The court decree that the real property be sold in its entirety pursuant to §78-39-1, *et seq.*, Utah Code Annotated (1953, as amended), and a division of the net proceeds thereof among the parties hereto and according to their respective rights including the costs of the title report obtained by Plaintiff.

4. The Defendants be restrained and enjoined from incurring any further expenses on the property or taking any income therefrom.

5. A receiver be appointed by this court to oversee and manage the property during the pendency of this litigation in accordance with the requirements of R. 66, Utah R. Civ. Pro. and that the costs and expenses of such receiver be paid by Defendants.

6. For reasonable attorneys' fees incurred by the Plaintiff in the prosecution of this action by reason of the actions undertaken in bad faith by Defendants pursuant to § 78-27-56, Utah Code Annotated (1953, as amended).

7. For an order that the costs, disbursements and expenses of this action, including the costs of partition and sale, and the costs of the receiver, be paid by the Defendants and be made a lien upon their share of the proceeds of the sale of the real property.

8. Plaintiff be granted such other and further relief as the court may deem just and equitable.

DATED this 9th day of ~~August~~ Sept., 2003.

JOHN BURTON ANDERSON
Attorney for Plaintiff

Plaintiff's address:

4931 South Fairview Drive
Salt Lake City, Utah 84117

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2005) as the matter that has been transferred to the Court of Appeals by the Utah Supreme Court.

STATEMENT OF ISSUES FOR REVIEW AND STANDARD OF REVIEW

1. Whether the Trial Court correctly determined as a Finding of Fact that Ada R. Craig intended that the 1981 Deed she executed created both a joint tenancy interest and retained for herself a possessory life estate. The standard of review regarding findings of fact, is that the Utah Court of Appeals will not set aside the Trial Court's findings unless clearly erroneous. *Chen v. Stewart,* 100 P.3d 1177, 1184 (Utah 2004).

2. Whether the Trial Court correctly determined that Ada R. Craig maintained a possessory life estate until her death on July 11, 2003 and intended to retain day-to-day control over the property, thereby defeating Appellants' right to an accounting for profits of the property until her death. The standard of review regarding findings of fact, is that the Utah Court of Appeals will not set aside the Trial Court's findings unless clearly erroneous. *Chen v. Stewart,* 100 P.3d 1177, 1184 (Utah 2004).

3. Whether the Trial Court, at its discretion, properly appointed Robert D. Irvine as receiver of the property. The standard of review is that the appointment of a receiver or the refusal to appoint is in the sound discretion of the Trial Court and the Utah Court of Appeals will not overturn on appeal unless the Trial Court abused its discretion. *Skirvin v. Mesta*, 141 F.2d 668, 673 (10th Cir. Ct. App. 1944). Further, this determination

is now moot and the Court in its discretion should summarily dismiss this issue on appeal.

STATEMENT OF THE CASE

This was a case for partition of that real property which was the personal residence of Ada R. Craig for most of her life (the "Home"), which was tried before the Utah District Court for Salt Lake County, Utah, Judge Hansen presiding, on September 28-29, 2004. The court issued its oral ruling on October 14, 2004, after having taken the matter under advisement. The Trial Court entered its Findings of Fact and Conclusions of Law and Order in favor of the Appellee [Plaintiff] on December 6, 2004, and appointed Appellee as Receiver to sell the Home.

Appellants filed a Motion for Reconsideration with the court on November 10, 2004, which was denied. Appellants filed with the Trial Court another post-trial Rule 59(e) Motion to Alter or Amend Judgment on December 20, 2004, which was also denied.

Appellants appealed from this final post-trial motion to the Utah Supreme Court. The appeal was transferred to the Utah Court of Appeals for disposition pursuant to Section 78-2-2(4), Utah Code Annotated on February 15, 2005.

STATEMENT OF FACTS

1. Ada R. Craig was the sole owner of her residence, real property located at 251 East 1700 South, Salt Lake City, Utah (the "Home"), until January 18, 1981. (Trial Exhibit No.7, ¶1; Transcript Volume II, pp. 5-7).

2. Ada R. Craig owned the Home and used it as her personal residence from approximately January 1973 until her death on July 11, 2003. During that entire time, she maintained the Home at her sole expense. (Trial Exhibit No.7, ¶2; Transcript Volume II, pp. 27-30).

3. Appellant Colleen Erickson lived in the Home under her mother's care and support for 46 years, including a period of several years after she married and had a child. (Trial Exhibit No.7, ¶2). Appellant Sharon Anderson lived with her mother in the Home for 43 years from 1954 to 1997. (Transcript p.3).

4. On January 19, 1981, Ada R. Craig executed a Quit-Claim Deed regarding the Home with the following language, "ADA R. CRAIG ... hereby QUIT-CLAIMS to ADA R. CRAIG, SHARON V. CRAIG and COLLEEN R. CRAIG as Joint Tenants with full rights of survivorship and not as tenants in common, reserving a life estate only for ADA R. CRAIG." (Trial Exhibit No.1) (herein the "1981 Deed").

5. Ada R. Craig stated in a letter to her daughters [Appellants] that she executed the 1981 Deed because "At the time I signed a quit claim deeding one third of my Home to each of you, I was concerned about Mark's [one of Ada's sons] wife causing some kind of a problem that could place my house in jeopardy. Also at that time you were single and my other children were married and living on their own." (Trial Exhibit No.7, ¶1).

6. Sharon Anderson testified that she understood that her mother, Ada R. Craig, intended for her to inherit the Home after her mother's death and that she would not receive that inheritance until her mother passed away. (Transcript, p. 5).

7. Colleen Erickson testified concerning the 1981 Deed that, "Shar[on] had a third and I had a third and my mom had a third, contingent upon the life estate of the property." (Transcript p. 69, line 9-10).

8. In the latter part of 1998 it became necessary for Ada R. Craig to move from her Home for the purpose of receiving extended assistance and care in a local nursing care facility. (Transcript Volume II, pp. 13-14).

9. In 1999, Ada R. Craig gave her eldest son, Robert D. Irvine, powers of attorney by signing a Durable Power of Attorney for the purpose of helping her manage the Home and assist her with her move into the Highland Care Center at the approximate cost of $5200 or $5300 per month. (Trial Exhibit No.8; Transcript Volume II, pp 20-22).

10. At the time Ada R. Craig moved into the Highland Care Center, the only substantial asset available to her to help pay for her care and other expenses was her Home. (Transcript Volume II, p. 27).

11. At the time Ada R. Craig moved into Highland Care Center, Appellants Sharon Anderson and Colleen Erickson refused to consent to the sale of their mother's house or her one-third joint tenancy interest, to pay for her care and other needs. (Transcript Volume II, pp. 31-35).

12. At the time Ada R. Craig moved into the Highland Care Center, Appellee and his wife provided their own personal financial assistance for the payment of the Highland Care Center monthly costs and other needs of Ada R. Craig and paid approximately $175,000 over the course of 3-4 years for Ada's care. (Transcript Volume II, p. 26).

13. On or about January 21, 1999, Ada R. Craig, with the assistance of her attorney, quit-claimed her remaining one-third joint tenancy interest to another daughter, Carolyn Abbott. Once again she retained her life estate, (January 21, 1999 Deed). (Trial Exhibit No.2, Transcript Volume II, pp. 35-37, 51, 53)

14. The January 21, 1999 deed stated "ADA R. CRAIG also known as RAE S. CRAIG ... grantor hereby QUIT-CLAIM to CAROLYN ABBOTT grantee the following described tract of land, reserving to the Grantor a life estate." (Trial Exhibit No.2; Transcript Volume II pp 35-37, 51, 53).

15. On February 2, 1999, Ada R. Craig sent a letter to her daughters (the Appellants) stating the following: "I didn't think I would ever be writing a letter to one of my children pleading for what already belongs to me. I now find it necessary to write to two of my children who have taken the position that the Home that I have owned for over fifty years no longer belongs to me ... It was never my intention that each of you receive one third of my Home until my death and you know that as well as I do ... When the funds from the sale of my Home are no longer needed in my behalf, it is my desire that you will receive your share of those funds as was intended when I quit claimed the Home to the three of us." (Trial Exhibit No.7; Transcript Volume II pp. 40-43).

16. On or about May 20, 2002, Carolyn Abbott conveyed her interest in the Home to Appellee, Robert D Irvine, for the purpose of furthering efforts to sell Ada's Home or at least her one-third interest therein and because Appellee had paid nearly all of Ada's nursing Home expenses. (Trial Exhibit No.3; Transcript Volume II, pp. 37-38).

17. Using his Power-of-Attorney, from approximately January 21, 1999 until his mother's death, Robert D. Irvine, at the direction of his mother, was able to rent the Home and use the modest net rental income to help provide for his mother's care. (Transcript Volume II, pp. 18-22, 26-27, 34).

18. Ada R. Craig passed away on July 11, 2003.

19. Immediately following the death of Ada R. Craig, Appellants claimed sole right and possession to the Home and excluded Appellee from the Home. Finally, Appellee brought this action to realize his rightful one-third interest in the Property, (Complaint, pp.4-6).

20. Robert D. Irvine had substantial experience in buying and selling real property and in managing real property and was a logical choice for appointment as a receiver.

21. Mr. Irvine was able to quickly accomplish a sale of the Home and at the hearing for approval of the sale, Appellants instead purchased the one-third interest of Mr. Irvine. (See Motion for Court Approval of Real Property p. 2).

22. The Trial Court, based on testimony of the parties and exhibits at trial, made Findings of Fact as follows:

> 1. There were two main issues presented at trial by the parties to the Court. First, what interest, if any, did Ada R. Craig ("Craig") have in the real property after executing the January 19, 1981 deed; and second, if Craig owned a joint tenancy interest in the real property following the execution of the January 19, 1981 deed, was she competent to transfer her interest in the property to her other daughter, Carolyn Abbott.
> 2. Based upon the strict application of the words of the deed, the Court finds that Ada R. Craig conveyed to herself and to her daughters Sharon Craig Anderson and Colleen Craig Erickson the property in joint tenancy,

with full rights of survivorship, and in addition to her one-third joint-tenancy interest, Craig also granted to herself a life estate in the real property.

3. The Court also finds that Ada Craig intended to grant un[to] herself and to her daughters a joint tenancy interest in the property, and [in] addition to her one-third joint tenancy interest, Craig also intended to grant to herself a life estate in the real property.

4. There was not any believable or persuasive evidence that Ada Craig intended to abandon control of the day to day operations or control of the property while Ada was alive. The evidence suggests that she intended to retain control over the property.

5. Following the execution of the 1981 Deed, Ada Craig, Sharon Anderson and Colleen Erickson shared a one-third interest in the totality of the property as joint tenants, with rights of survivorship.

6. Ada Craig retained a joint tenancy interest so that if one or both of her daughters predeceased her, a share or all of the property would return to Craig, and not go to another family member of the co-owner daughters. She was interested in giving the property to her daughters if she died, but was not interested in giving the property to one of her daughters' heirs if a daughter predeceased her. She therefore intended to retain a joint tenancy interest in the property.

7. The life estate Craig retained in addition to her joint tenancy interest was also retained for another important purpose: By creating a life estate only for herself, Ada intended to retain day-to-day control of the property. The 'reserving a life estate only" language in the 1981 deed was intended to reserve the life estate only in the name of Ada, and not in the name of her daughters, which excludes her two daughters from control of the property while Ada Craig was alive.

8. The evidence shows that Ada Craig said she owned the property following the 1981 deed, and also that Colleen Erickson testified that this was a 1/3rd, 1/3rd, 1/3rd ownership relationship between Ada, Colleen Erickson, and Sharon Anderson. Other witnesses who testified for plaintiff supported this interpretation of Ada Craig's ownership intent.

9. Whether one looks to Ada's intent, or looking at the actual language of the 1981 deed, the result is the same, as specified above. (Findings of Fact, pp. 2-3).

SUMMARY OF ARGUMENTS

1. The Trial Court correctly found that the 1981 Deed created both a possessory life estate and a joint tenancy interest in Ada R. Craig. While interpreting a

deed, the intent of the grantor prevails. *Khalsa v. Ward,* 101 P.3d 843, 845 (Ut. Ct. App. 2004). The primary rule of construction for a deed is that the intent of the grantor should be determined and carried out. 23 Am. Jur. 2d Deeds § 193 (2005). The Trial Court determined, as a Finding of Fact that Ada R. Craig intended to grant a joint tenancy interest to herself, Sharon Anderson and Colleen Erickson, each with 1/3 interests in the Home for the purpose of giving the Home to them if she passed away. (See Findings of Fact ¶¶ 2-7). In addition, the Trial Court found that Ada R. Craig intended to retain a life estate so that she could maintain the day-to-day control and use of the Home for her lifetime. (See Findings of Fact ¶¶ 2-7). Therefore, unless Appellants demonstrate clear error by the Trial Court, this Court should uphold the Trial Court. Courts have determined that a life estate and a tenancy in common are not inconsistent estates and can be held in the same person at the same point in time. *See United States v. Gibbons,* 71 F.3d 1496, 1500 (10th Cir. Ct. App. 1995). Therefore, the Trial Court's findings should stand.

2. The Trial Court correctly determined that the Appellants are not entitled to an accounting for rents and expenses of the Home through the period of time that Ada R. Craig was still alive and in need of the meager rental income which helped contribute to her living needs. The Trial Court determined, as a matter of fact, that Ada R. Craig's intent was to maintain the day-to-day control of the Home while alive, thereby excluding her two daughters from control of the Home while she was living. (See Findings of Fact ¶ 7). The Trial Court further determined that Ada R. Craig's intent in 1981 was that her daughters receive the Home upon her death, but not prior. (See Findings of Fact ¶ 6).

Based on the facts and the language of the 1981 Deed and the January 21, 1999 deed, the Trial Court correctly determined that Ada R. Craig had properly retained a life estate. (Conclusions of Law, p. 2). Therefore, unless the Appellants demonstrate clear error and the Court determines that the Trial Court incorrectly determined the law, the Court should uphold the Trial Court's findings. Moreover, the possessor of a life estate is entitled to all of the property's rents and profits. *See Hammond v. McArthur*, 183 P.2d 1 (CA. 1947) (Wherein one joint tenant conveyed to the other a life estate in the property with the right to all of its rents and profits - the court held that the granting of the life estate did not terminate the joint tenancy insofar as the right of survivorship was concerned).

3. The Trial Court acted properly within its discretion to appoint Robert D. Irvine as receiver of the Home under its close supervision. Mr. Irvine had substantial experience with real estate and was credible and trustworthy. Mr. Irvine's instruction from the Trial Court was to sell the property under the close scrutiny of the Trial Court. Mr. Irvine procured a sale, but Appellants preempted the sale when on the eve of court approval of the sale, Appellants instead offered to purchase the 1/3 interest of Mr. Irvine. The purchase of the one-third interest of Mr. Irvine by Appellants has rendered the issue moot.

4. Appelle prevailed at trial and on all post-trial motions. Appellee is entitled to his costs of appeal in accordance with Rule 34(a) of the Utah Rules of Appellate Procedure and upon presentation of a bill of costs.

ARGUMENTS

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE 1981 DEED CREATED A POSSESSORY LIFE ESTATE AND A JOINT TENANCY INTEREST IN THE GRANTOR CONSISTENT WITH THE GRANTOR'S INTENT.

A. The Standard of Review for Findings of Fact is Clear Error.

Although the Trial Court made Findings of Fact, Appellants have made no reference to set those aside, have marshaled no evidence in opposition, and have relied solely on their technical legal argument. Not surprisingly, the Trial Court found against Appellants on every factual issue presented.

Appellants have stated to this Court that the standard of review is merely the standard of "correctness". Appellants have flatly ignored the Findings of Fact which supported the Trial Court's Conclusions of Law. The issues raised by Appellants are mixed issues of fact and law. For such issues, the Court must divide its deliberations between legal issues and fact issues. The correct standard for overturning a Trial Court's findings of fact is "clearly erroneous". In short, the Court would have to find that the Trial Court so clearly misconstrued the facts that it was clearly erroneous. This Court normally gives deference to the Trial Court which has seen and heard the witnesses and their testimony.

"To successfully challenge an ultimate finding of fact, 'an [A]ppellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.'" *Parduhn v. Bennett,* 112 P.3d 495 (Utah 2005) (quoting *Chen v. Stewart,* 100 P.3d 1177, 1184 (Utah 2004). A Trial Court's findings of fact will

not be set aside unless clearly erroneous. *Chen* 100 P.3d at 1184. A Trial Court's conclusions of law are reviewed for correctness. *Khalsa v. Ward,* 101 P.3d 843, 845 (Ut. Ct. App. 2004) (citing *Lovendahl v. Jordan Sch. Dist.*, 63 P.3d 705, 709 (Utah 2002)).

The burden is on Appellants to present and overturn the Trial Court's Findings of Fact. Concerning the Clear Error standard, the Supreme Court has said, "We have no business disturbing the District Court's ruling 'simply because we would have decided the case differently,' but only if based 'on the entire evidence, [we are] left with the definite and firm conviction that a mistake has been committed.'" *Georgia v. Ashcroft*, 539 U.S. 461, 463 (2003).

Ultimately, since Appellants have made no attempt to marshal evidence to overturn the Findings of Fact, this Court must necessarily accept those Findings as determined by the Trial Court. The judgment in favor of Appellee must stand.

B. When Interpreting a Deed, the Intent of the Grantor Must Govern.

Out of care and concern for her daughters, who were single and still residing at home, in 1981, Ada R. Craig made arrangements to provide them with some security when she passed away. She did so by executing a deed to them as joint tenants with her, each of them owning a 1/3 interest. By reserving to herself a life estate, she intended to maintain the use and control of the Home during her life. Her care and concern for her daughters was not rewarded in kind when she really needed help.

The Trial Court correctly applied long-standing rules of construction to the 1981 Deed when it gave the deed meaning consistent with the express language of the deed and with Ada R. Craig's intent. This Court has said that while interpreting a deed, the

intention of the parties, drawn from the whole deed must govern. *Khalsa v. Ward,* 101 P.3d 843, 845 (Ut. Ct. App. 2004). In construing a deed, a court will determine intent from the four corners of the document and look to parol evidence if ambiguous. *RHN Corp. v. Veibell,* 96 P.3d 935, 945 (Utah 2004). Utah courts will interpret deeds in the same manner as contracts. *Holladay Duplex Management Co., L.L.C. v. Howells,* 47 P.3d 104, 105 (Ut. Ct. App. 2002).

The Trial Court determined in its Findings of Fact that Ada R. Craig intended to grant unto herself and to her daughters, Sharon Craig and Colleen Erickson,a 1/3 joint tenancy interest in the Home. (See Findings of Fact p. 2 ¶¶ 2-3). In addition, the court found that Ada intended to retain a life estate in the Home. (See Findings of Fact p. 2 ¶ 3). Ada R. Craig did this with the intent to retain the day-to-day control over the Home during her lifetime, and furthermore, to give the Home to her daughters when she died, but not prior. (See Findings of Fact p. 3 ¶¶ 6-7).

These findings are consistent with Ada R. Craig's actions. Ada intended to retain a possessory interest and from 1981 until 1999 continued to live in, maintain, remodel, and improve the residence. (Transcript Volume II, pp. 9-14). Thereafter, she appealed to her co-owner daughters to sell the Home so she would have her 1/3 share to use toward her living and care expenses. (Trial Exhibit No.7 ¶¶ 2-3). The daughters refused so she appointed her eldest son, Robert D. Irvine as her agent to rent the Home and use the rents to assist with her abundant health care costs at the Highland Care Center. (Trial Exhibit No.8; Transcript Volume II, pp. 18-20). Ada R. Craig was competent and understood her needs and desires. (Findings of Fact, p 4, ¶¶11-13).

By construing the 1981 Deed according to its plain language and consistent with Ada R. Craig's intent, the Trial Court acted in accordance with long-standing rules of deed construction. As stated in paragraph A above, it is the responsibility of Appellants to attack the evidence and Appellants have made no effort to rebut the conclusions of the Trial Court.

Interpreting the 1981 Deed otherwise, would work against the manifest best interests of Ada R. Craig and would produce unjust results. Ada's undeniable interest was that her only substantial asset, her Home, would be preserved as her residence for life, or an income for life. The 1981 Deed also assured her and her daughters that they or she (Ada) would receive the fee interest at the death of the last survivor while the joint tenancy existed. Even the Appellants' testimony corroborates Ada Craig's intent with regard to the property. Colleen Erickson testified concerning the 1981 Deed that, "Shar[on] had a third and I had a third and my mom had a third, contingent upon the life estate of the property." (Transcript, p. 69, line 9-10).

As it turned out, Ada's retention of a one-third interest was also the only way to provide assistance for her living and care costs. Accordingly, the intent of Ada R. Craig was—and therefore the Trial Court's determination was—that Ada R. Craig granted to herself a joint tenancy interest as well as a life estate. The Trial Court was correct as a matter of law, and there was ample support for its factual findings.

C. Ada R. Craig's Joint Tenancy Interest and Life Estate are Distinct and Separate Legally Consistent Property Interests.

No one disputes that Ada R. Craig could convey the Home to herself and her daughters as joint tenants with right of survivorship. No one disputes that Ada R. Craig could convey the Home to her daughters and retain for herself a life estate. Appellants argue that she cannot do both at the same time. Appellee did not agree and neither did the Trial Court.

Without citing case law, Appellants argue that a merger occurs when a greater and lesser interest in real property are conveyed or retained. However, where the intent of a grantor is clear, courts have had no difficulty in allowing the two interests to be given full effect.

Courts have held that a life estate and a tenancy in common are not inconsistent estates and can be held in the same person at the same point in time. *See United States v. Gibbons,* 71 F.3d 1496, 1500 (10th Cir. Ct. App. 1995). *See also Cole v Cole,* 294 P.2d 494, 495 (Ca. Ct. App. 1956); *Hammond v. McArthur*, 183 P.2d 1 (CA. 1947). In *Hammond*, Rowley, a widow, and McArthur, an unmarried woman, acquired certain real property as joint tenants. *Id.* Later, McArthur conveyed to Rowley a life estate in the property by deed. *Id.* Hammond, Rowley's successor, claimed that the conveyance of the possessory interest extinguished the joint fee ownership and survivorship rights, claiming the rights were inconsistent. *Id.* McArthur argued that the grant of the life estate did not convey to Rowley anything that she did not already possess and that the life estate was not repugnant to the rights of survivorship. *Id* at 3-4.

The court found for McArthur and held that when one of two joint tenants in fee simple makes a conveyance of his or her interest for life, upon the termination of the life interest, the joint tenancy, as it originally existed, revives. *Id* at 8.

This is consistent with the finding in *United States v. Gibbons.* In that case, a husband and wife owned a Home as joint tenants. *Id.* The divorce decree awarded the wife a conditional right to live on the property during her lifetime. *Id.* The court held that the wife held a life estate, or possessory interest, in the whole of the property and a remainder interest, or tenancy in common interest, of one-half in the property. *Id* at 1499. Although the separation agreement severed the joint tenancy, the wife still maintained a simultaneous possessory and remainder interest via a life estate and tenancy in common estate in the Home. *Id.*

The case at hand is similar. Ada R. Craig intended to grant to herself and to two of her daughters a 1/3 fee interest each in joint tenancy with full right of survivorship. Ada R. Craig also intended to retain a life estate in order that she could maintain the day-to-day control, possession and enjoyment of the Home until her death. Appellant, Sharon Anderson, understood that this meant she would not receive her interest in the Home until her mother passed away. (Transcript p 5, lines 5-10). Colleen Erickson clearly understood that her mother owned a one-third interest in the Home. The two estates in Ada R. Craig are not incompatible but are legally sustained and are consistent with her intent as determined by the Trial Court. Therefore the Findings of Fact and Conclusions of Law by the Trial Court must stand.

D. Appellants Misstate the Holding of *Robinson v. King*, the Sole Authority Supporting Their Position.

The Appellants would have the Court use antiquated technicalities to override the intent of Ada R. Craig even though misapplied and misconstrued. The bedrock of their position (that a habendum clause granting a life estate which accompanies a granting clause conveying a fee simple interest in real estate must then limit the grantee's interest to a life estate only and no fee interest) is based on a single North Carolina case, *Robinson v. King.* However, Appellants have misunderstood and misstated the holding of that case.

The court in *Robinson* relied on a previous North Carolina case, *Triplett,* when it said:

> [T]his doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its especial function, *is becoming obsolete in this country*, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the *intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor*...."

Robinson v. King, 314 S.E.2d 768, 772 (N.C. App. 1984) (emphasis added).

The court further stated, "For forty years after *Triplett* the North Carolina Supreme Court consistently construed deeds according to the overall intent expressed in the instrument." *Id* at 773. The court then concluded that:

> The surrounding circumstances and evidence apart from the quitclaim deed are ambiguous at best, *and fail to show a clear intent on the part of the grantors to convey a fee simple.*

Id at 775 (emphasis added).

The court clearly based its holding on a determination of the *intent* of the grantor after reviewing the deed itself, the Last Will and Testament of the decedent and other surrounding circumstances. *Id* at 774. As the holding states at page 775, there was no clear intent to grant a fee simple. *Id* at 775. The court used modern rules of deed construction to ascertain the intent of the grantor and did not use antiquated technicalities to interpret the deed as Appellants are urging the court to do in the case at hand.

Appellants also rely on the definition of "Habendum Clause" in the Black's Law Dictionary 5th edition to support their position and have quoted this portion in their brief:

> A habendum clause is the clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee. The office of 'habendum' is properly to determine what estate or interest is granted by the deed, though office may be performed by the premises, in which case the habendum may lessen, enlarge, explain, or qualify, *but not totally contradict or be repugnant to, the estate granted in the premises*.

Black's Law Dictionary 5th Edition, page 639 (Appellants' brief page 12) (emphasis added).

A habendum clause is traditionally the "To have and to hold" clause. The granting clause in the 1981 Deed which states, "Ada R. Craig, grantor of Salt Lake City, County of Salt Lake, State of Utah, hereby Quit-Claims to Ada R. Craig, Sharon V. Craig and Colleen R. Craig as Joint Tenants with full rights of survivorship and not as tenants in common . . ." grants to Ada R. Craig, and two of her daughters, Sharon Anderson and Colleen Erickson, each a 1/3 joint tenancy with full rights of survivorship. As the Black's Law definition states, the language afterward, or habendum clause as Appellants label it, can lessen, enlarge, explain or qualify *but not totally contradict or be repugnant to*, the

estate granted in the premises. It would be absurd for Ada R. Craig to grant unto herself a 1/3 joint tenancy interest with full right of survivorship only to take it away directly afterward.

The explanation brought forth by Appellants defies all reason and common sense. Furthermore, the Appellants' explanation results in a habendum clause that is contradictory or repugnant to the premise or granting clause. The dictionary defines repugnant as inconsistent or incompatible. (See Merriam Webster's Online Dictionary). To grant a joint tenancy interest and thereafter, take it away only to supplant it with something less is clearly inconsistent, contradictory and illogical. Moreover, this would be in opposition to the function of a habendum clause, and therefore cannot possibly define the intent of the grantor and therefore the 1981 Deed.

In order to be consistent with the Black's Law definition brought forth by Appellants, the habendum clause after the premise or granting clause might say something to limit, qualify, or expand the grant. Examples might be "with right to all rents" or "with right to exclude all other owners" or "with no alcohol on the premises" in order to properly coincide with the Black's Law definition. These are examples of language that serve to lessen, enlarge, explain or qualify but not contradict or be repugnant to the premise.

The language immediately following the premise or granting clause in the 1981 Deed states, "**[R]eserving a Life Estate** only for Ada R. Craig." (emphasis added). This language, if it is a habendum clause, is clearly contradictory and repugnant to the granting language. Therefore, the language functions not as a habendum clause, but **as a**

reservation of a life estate in the grantor. If it is a habendum clause, the fact that it contradicts logic and the premise itself works contrary to the proper function of a habendum clause. As such, it is more likely that the language results in a granting clause followed by a reservation if antiquated technicalities are to serve our purposes for deed construction.

Based on the foregoing, the court should look at the intent of the grantor in construing the 1981 Deed. Appellants must therefore bring forth enough evidence to show clear error by the Trial Court in determining the intent of Ada R. Craig before the Trial Court's Findings of Fact can be set aside. To put it bluntly, Appellants have no legal authority to support their position and no credible factual evidence to dispute the findings of the Trial Court. The Trial Court's findings must stand.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT THE APPELLANTS ARE NOT ENTITLED TO AN ACCOUNTING FOR PROFITS AND EXPENSES OF THE PROPERTY THROUGH THE PERIOD OF TIME THAT ADA R. CRAIG WAS STILL ALIVE.

Ada R. Craig's nursing Home costs exceeded $5,000.00 per month. Amazingly, while not contributing anything to the costs of their mother's care and having received a magnanimous gift of two-thirds ownership in the Home, Appellants would now have the Court take back the meager rental income Ada received and used to partially fund her care.

Ada R. Craig, at all times, retained a life estate in her Home. Appellants argue once again that the Court should ignore her obvious intent and eliminate her life estate as

a result of the 1999 deed to Carolyn Abbott. Once again, Appellants argue without legal authority and in the face of overwhelming law in favor of Appellee.

During the continuance of a life estate in real property the life tenant is entitled to the possession, control, and enjoyment of the property. 31 C.J.S. Estates § 36 (2005).

The courts will presume a merger only if equity demands it. *Miller v. Martineau & Co.,* 983 P.2d 1107, 1113 (Ut. Ct. App. 1999) (quoting *Federal Land Bank v. Colorado Nat'l Bank,* 786 P.2d 514, 515 (Colo. Ct. App. 1989) ("'Equity does not favor the doctrine of merger . . . .'").[1]

Appellants claim that they are entitled to an accounting of profits and expenses because Ada R. Craig conveyed all of her interest in the Home to Carolyn Abbott in the 1999 deed. In the eyes of Appellants, the life estate and the joint tenancy interest merged in Carolyn Abbott contrary to the express language and intent of the deed. As a result, they argue that Appellants' interests in the property became present interests on the date of the 1999 deed if not before. (See Brief of Appellant pg 17 ¶ 1-2).

The Quit-Claim Deed dated January 21, 1999 contains the following language, "ADA R. CRAIG also known as RAE S. CRAIG ... grantor hereby QUIT-CLAIM[s] to CAROLYN ABBOTT grantee the following described tract of land... *Reserving to the Grantor a life estate.*" (Trial Exhibit No.2) (emphasis added).

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[1] *See alsoMontgomery v. Browder,* 930 S.W.2d 772, 781 (Tx. Ct. App. 1996) (Holding that the doctrine of merger of estates is not favored, and does not apply where it is the intention of the parties that it should not apply and when it is in the interest of the holder of the two estates to keep them separate); *Western Bank of Las Cruces v. Malooly,* 895 P.2d 265, 270 (NM. Ct. App. 1995) (Courts will not compel a merger of estates where the party in whom the two interests are vested does not intend such a merger to take place, or where it would be inimical to the interest of the party in whom the several estates have united).

The possessory life estate and joint tenancy interests of Ada R. Craig could not have merged in Carolyn Abbot because the deed clearly reserves the life estate to Ada. Ada R. Craig retained her possessory life estate interest until she passed away in 2003. With her possessory life estate interest, Ada R. Craig retained her right to, "[P]ossession, control, and enjoyment of the property" throughout her lifetime. 31 C.J.S. Estates § 36 (2005). At no time did Carolyn Abbott, or later Robert D. Irvine, claim ownership or use of income derived from rental of the Home. At all times, the rents were used solely for the benefit of Ada R. Craig.

Even if technical rules required that the life estate interest and the joint tenancy interest united in Carolyn Abbott, a merger would be contrary to the best interests of the grantor because Ada R. Craig needed and attempted to utilize her ownership in the property to pay for her health care expenses. Therefore, equity would dictate that no merger took place.

A further technical defect in the argument of Appellants is the dates of ownership of Appellee, Robert D. Irvine. Appellants have asked for an accounting form January 21, 199 through July 11, 2003. Mr. Irvine received a conveyance from his sister, Caroline Abbott on May 20, 2002. Thus, prior to that date, he had no ownership rights or control, except acting as an agent for Ada R. Craig. If Appellants' arguments were accepted, Mr. Irvine, at worst, would owe to Appellants an accounting from May 20, 2002 until July 11, 2003, when Appellants immediately excluded him from the Home.

However, we need not pursue this line of thinking further because the plain language of the deed clearly reserves a life estate in the grantor, thereby resulting in a

conveyance of the joint tenancy interest only to Carolyn Abbott. The Trial Court clearly determined the intent of Ada R. Craig with regard to the 1999 deed (a factual determination). Appellants have offered nothing to overturn the Findings of the Trial Court. As a result, Appellants' request for an accounting of income and expenses of the property fails and the holding of the Trial Court must stand.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPOINTING ROBERT D. IRVINE AS RECEIVER FOR THE SALE OF THE HOME.

Appellants suffered no harm or prejudice, but they still want to dispute the appointment of Mr. Irvine as receiver. However, the Trial Court properly applied its discretion when it appointed Appellee as receiver of the property under its direct supervision. Mr. Irvine has spent his career buying, selling, managing, and developing real property. The sale of a Home under the supervision of the Trial Court seems a reasonable task for Mr. Irvine.

The court bases its authority to appoint a receiver on its inherent equitable power. *Interlake Co. v. Von Hake,* 697 P.2d 238, 239 (Utah 1985) (A receivership is an equitable matter and is entirely within the control of the court.) (citing *Shaw v. Robison,* 537 P.2d 487, 490 (Utah 1975)).

"In determining whether to continue a receivership or discharge the receiver the court will consider the rights and interests of all parties concerned . . . ." *Shaw* 537 P.2d at 490. A receiver is an officer of the court acting under its direct supervision. *Interlake Co.* 697 P.2d at 240. Therefore, a receiver has limited power and must seek advice from the courts. *Id.*

The appointment of a receiver or the refusal to appoint is in the sound discretion of the Trial Court and will not be overturned on appeal unless an abuse of discretion is shown. *Skirvin v. Mesta*, 141 F.2d 668, 673 (10th Cir. Ct. App. 1944). *See also Milwaukee & M.R. Co. v. Soutter,* 154 U.S. 540, 541 (1864); *Lee v. Farmers Co-Op. Ass'n of Mountain View,* 113 P.2d 391, 393 (OK. 1941).

Mr. Irvine was familiar with the property and had managed the property for his mother, Ada R. Craig. In addition, Mr. Irvine has vast experience managing property. Therefore, Mr. Irvine was the person most able to meet the requirements of a receiver under the circumstances. The Trial Court justifiably determined that he was qualified and limited his authority to arranging a sale. When Mr. Irvine brought a final sale arrangement to the court for approval, Appellants instead asked the court if they could jointly purchase the 1/3 interest of Mr. Irvine at the offered price and the Trial Court granted their request.

The Trial Court adequately protected the interests of all parties through its close supervision and Mr. Irvine effected a sale. Appellants were unable to demonstrate harm or prejudice at trial, and have suffered no harm. They have neither alleged nor shown harm to this Court. If there is no harm, then what is the complaint? It may be appropriate for this Court to adopt an adage sometimes utilized in athletics, i.e. "No Harm – No Foul." Regardless of whether the Trial Court was right or wrong (and Appellee does not concede that it was wrong), it is a moot point. The Trial Court gave the order, the receiver fulfilled his duty and Appellants now are the fee owners of the property. The Court should therefore summarily dismiss this claim.

IV. APPELLEE PREVAILED AT TRIAL AND IS ENTITLED TO RECEIVE FROM APPELLANTS HIS COSTS

Rule 34(a), Utah Rules of Appellate Procedure provides that upon affirming an order or award, the Appellee should be awarded his costs. Appellee has incurred costs and expenses which are the subject of this Rule. The Court should award Appellee his costs of appeal upon presentation of such costs.

CONCLUSION

The Trial Court correctly determined that a deed executed in 1981 created both a joint tenancy interest and a possessory life estate Home of the grantor, Ada R. Craig, consistent with her intent. The Trial Court determined within its Findings of Fact that Ada R. Craig intended to retain both interests in the Home. Long established rules of deed construction require that a grantor's intent prevail over antiquated technicalities and arbitrary rules of construction. Therefore, a court should not set aside the Trial Court's findings unless clearly erroneous, thereby preserving the grantor's intent. Appellants have not shown clear error.

The Trial Court correctly determined that the Appellants are not entitled to an accounting of profits and expenses for the period of time Ada R. Craig was still alive. The plain language of the 1999 deed clearly granted to Carolyn Abbott the joint tenancy interest while reserving a life estate in Ada R. Craig. The Trial Court found that this was also consistent with Ada R. Craig's intent to retain the day-to-day control of the property until she passed away. Therefore, as the holder of a possessory life estate, Ada R. Craig

was entitled to the benefit of possession, enjoyment and rental income from the Home to supplement her abundant health care costs until she passed away.

The Trial Court acted properly within its discretion when it appointed Appellee as receiver for the Home. Mr. Irvine was familiar with the Home because he managed it for his mother while she received care at Highland Care Center. He had substantial experience buying, selling, and maintaining real property. In addition, the Trial Court closely supervised every action. Furthermore, Appellants have failed to show any harm. However, the issue is moot because the Appellants have purchased the interests of Mr. Irvine and are now owners of the Home.

For all of the foregoing reasons, the holdings of the Trial Court must stand and Appellee should receive an award of his costs on appeal.

Dated this 18 day of October, 2005.

ASTILL ASSOCIATES, PC

Dennis M. Astill
Attorneys for Appellee, Robert D. Irvine

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October, 2005, true and correct copies of the foregoing **BRIEF OF APPELLEE** were served to the persons and in the manner below:

James G. Swensen, Jr., USB No. A3874
SWENSON & ANDERSEN PLLC
136 South Main Street, Suite 318
Salt Lake City, Utah 83101

( ) U.S. mail, first-class, postage prepaid
( ) Facsimile
(X) Hand Delivery
( ) Overnight courier

Dennis M. Astill
Attorney for Appellee and Plaintiff

ADDENDUM

Trial Exhibit 1
Quit-Claim Deed
dated January 19, 1981

TRIAL EXHIBIT 1

at _____ M. Fee Paid $_____

by _____ Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to _____ Address _____

3525030

QUIT-CLAIM DEED

ADA R. CRAIG,

grantor

of SALT LAKE CITY, County of SALT LAKE, State of Utah, hereby QUIT-CLAIMS to ADA R. CRAIG, SHARON V. CRAIG and COLLEEN R. CRAIG as Joint Tenants with full rights of survivorship and not as tenants in common, reserving a Life Estate only for ADA R. CRAIG

grantees

of SALT LAKE CITY, COUNTY OF SALT LAKE, STATE OF UTAH for the sum of TEN DOLLARS AND NO/100---------- DOLLARS, and other good and valuable consideration the following described tract of land in Salt Lake County, State of Utah:

Commencing 272.25 feet West from Southeast Corner Lot 1, Block 12 5 Acre Plat "A," A Big Field Survey West 66 feet North 170.1 feet East 66 feet South 170.1 feet to beginning.

C 67

REQ OF Ada R. Craig
$ 4.50
DEP
JAN 19 10 30 AM '81
KATIE L. DIXON
RECORDER
SALT LAKE COUNTY,
UTAH

C67-115-22
X351 E 1760 Sq SLC 84115

WITNESS the hand of said grantor, this 19th day of January, A. D. one thousand nine hundred and Eighty-one

Signed in the presence of

X Ada R. Craig
ADA R. CRAIG

STATE OF UTAH,
} ss.
COUNTY OF SALT LAKE

On the 19th day of January, A.D. 19 81 personally appeared before me ADA R. CRAIG the signer of the within instrument, who duly acknowledged to me that she executed the same.

Beverly A Jackson
Notary Public.

My commission expires 1/18/84 Residing in Salt Lake City, Utah

NOTARY PUBLIC STATE OF UTAH

BOOK 5202 PAGE 1168

APPROVED FORM — UTAH SECURITIES COMMISSION

FORM 103—QUIT CLAIM DEED—REV 75 W. NINTH SOUTH S.L.C. UTAH

Trial Exhibit 2
Quit-Claim Deed
dated January 21, 1999

TRIAL EXHIBIT 2

7237662

Recorded at Request of _____

at _____ M. Fee Paid $_____

by _____ Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to Grantee Address 4931 Fairview Dr. SLC, UT 84117

QUIT-CLAIM DEED

ADA R. CRAIG also known as RAE S. CRAIG

of SALT LAKE CITY , County of SALT LAKE , State of Utah, hereby grantor
QUIT-CLAIM to

CAROLYN ABBOTT

of SALT LAKE CITY, UTAH grantee
TEN AND NO/100 DOLLARS, for the sum of
and other good and valuable consideration
the following described tract of land in SALT LAKE County,
State of Utah:

Commencing 272.25 feet West from Southeast Corner Lot 1, Block 12, 5 Acre Plat "A", A Big Field Survey; West 66 feet; North 170.1 feet; East 66 feet; South 170.1 feet to beginning.

Reserving to the Grantor a life estate.

WITNESS the hand of said grantor , this day of , A. D.

Signed in the presence of

Ada R. Craig

Ada R. Craig

STATE OF UTAH,
County of Salt Lake } ss.

On the 21st day of January 1999 A. D. personally appeared before me

Ada R. Craig also known as RAE S. CRAIG

the signer of the foregoing instrument ~~who duly acknowledge~~ to me that she executed the same.

NOTARY PUBLIC
DARRYL L. THAXTON
6000 Enque Way

BK8241P

7237662
01/28/99 3:05 PM 10.00
NANCY WORKMAN
RECORDER, SALT LAKE COUNTY, UTAH
SUTHERLAND TITLE
REC BY:R FRESQUES ,DEPUTY - WI

Trial Exhibit 3
Warranty Deed
dated May 20, 2002

TRIAL EXHIBIT 3

Recorded at Request of _____

at _____ M. Fee Paid $_____

by _____ Dep. Book _____ Page _____ Ref.: _____

Mail tax notice to Grantee Address 4931 So FAIRVIEW DR. SLC UT 84117

WARRANTY DEED

8251901

CAROLYN ABBOTT

of SALT LAKE CITY, UTAH , County of SALT LAKE , State of Utah, hereby grantor CONVEY and WARRANT to

ROBERT D. IRVINE

of SALT LAKE CITY, UTAH grantee for the sum of TEN AND NO/100 DOLLARS, and other good and valuable consideration the following described tract of land in SALT LAKE County, State of Utah:

Commencing 272.25 feet West from Southeast Corner Lot 1, Block 12, 5 Acre Plat "A", A Big Field Survey; West 66 feet; North 170.1 feet; East 66 feet; South 170.1 feet to beginning.

16-18-181-013

WITNESS, the hand of said grantor, this 20th day of May 2002, A. D.

Signed in the Presence of

Carolyn Abbott

Carolyn Abbott

STATE OF UTAH,
County of Salt Lake } ss.

On the 20th day of May 2002, A. D. personally appeared before me Carolyn Abbott the signer of the within instrument, who duly acknowledged to me that she executed the same.

NOTARY PUBLIC
Roger A. Sutherland
920 East Wood Oak Lane
Salt Lake City, Utah 84117

BK8605P

8251901
06/03/2002 03:58 PM 12.00
Book - 8605 Pg - 1544-1545
GARY W. OTT
RECORDER, SALT LAKE COUNTY, UTAH
SUTHERLAND TITLE
BY: SLH, DEPUTY - WI 2 P.

BK 8605 PG 1544

NOTARY PUBLIC
Roger A. Sutherland
329 East Wood Oak Lane
Salt Lake City, Utah 84117
My Commission Expires
May 1, 2004

BK 8605 pg 1544

Trial Exhibit 7
Correspondence by Ada R. Craig
dated February 2, 1999

TRIAL EXHIBIT 7

February 2, 1999

Dear Colleen;

I didn't think I would ever be writing a letter to one of my children pleading for what already belongs to me. I now find it necessary to write to two of my children who have taken the position that the home that I have owned for over fifty years no longer belongs to me. I have provided a comfortable home for both of you for your entire lives. I didn't think that I would ever need the services of a care center, but like many others I now find myself in that position. I know that you enjoy being comfortable, I too would enjoy being comfortable for the balance of my life. I don't need a spacious house, but I would at least like the comfort of a private room of my own in this care center. At the time I signed a quit claim deeding one third of my home to each of you, I was concerned about Mark's wife causing some kind of a problem that could place my house in jeopardy. Also at that time you were single and my other children were married and living on their own. There have been many changes since then, both of you are now married like my other children and have husbands to see to your needs. I don't have a husband to see to my needs, all I have is my home and I need the funds from the sale of my home. It was never my intention that each of you receive one third of my home until my death and you know that as well as I do. I have never asked for financial help from any of my children and don't intend to start now. I worked very hard for many years remodeling and improving my home to make it a good home for my family. I spent a lot of money in the process, my money, not yours.

Sharon you told me you would not sign a quit claim deed back to me because Colleen would get mad at you and never let you see little Mark again. Shame on you Colleen for using your son as a bargaining chip against your mother. It's becoming very obvious to me that my comfort doesn't hold very high priority with either of you. As you are aware Bob now has power of attorney over me and all my affairs, and in that power of attorney any and all prior powers of attorney of any nature are revoked and terminated. Bob has asked you both for information and papers to assist us in taking care of my affairs. Colleen you told him that you didn't have to give him anything. Let me remind you Colleen you are and have been living in my home for 46 years using my furniture and my belongings. The items that Bob asked for belong to me, not you. I am asking you now to either bring them to me or have them available to be picked up by February 8th. The following are the items that I would like:

1-My 1998 bank statements and checks (copies are available from the bank for $600.00)
2-Items from my safety deposit box
3-My purses and wallet together with credit cards, etc.
4-My equitable life policy (medical) and card
5-All my social security information and card
6-All my 1998 paid bills including medical
7-Copy of my will
8-All my medicare information, bills and card
9-My 1997 income tax copies (federal and state)

10-My light and magnifying instrument
11-My hearing aid coupons
12-Balance of my credit union savings account or an explanation as to the use of the funds
13-My metal can and its contents

Please call me and tell me if you are going to bring these or if I need to arrange to have them picked up.

I love all my children and grand children and desire to see them all. My needs have changed drastically in just a short while and I need your cooperation. When the funds from the sale of my home are no longer needed in my behalf, it is my desire that you will receive your share of those funds as was intended when I quit claimed the home to the three of us.

Lots of Love

Mom,

Trial Exhibit 8
Durable Power of Attorney
of Ada R. Craig
dated January 11, 1999

TRIAL EXHIBIT 8

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, Ada Rae Craig, have made, constituted and appointed and by these presents do make, constitute and appoint Robert Douglas Irvine, my true and lawful attorney for me and in my name, place and stead, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing requisite and necessary to be done in connection with my affairs, including, but not limited to, dealing with any real or personal property that I may own or may hereafter acquire; to receive, collect and recover all sums of money, debts and accounts due me; to sue and use all other lawful means to collect all such money, debts, and accounts; to compromise all claims by or against me; to pay from my funds all of my just debts and obligations; to expend funds for my support and maintenance; to create a revocable or irrevocable trust during my lifetime and to transfer my property to the trustees thereof, which trust may extend beyond my lifetime; to create and sever joint tenancies of property; and to arrange and pay for any medical or nursing home care that I may require during my lifetime. THIS POWER OF ATTORNEY SHALL NOT BE AFFECTED BY MY DISABILITY. I hereby ratify and confirm all that my said attorney Robert Douglas Irvine may lawfully do and cause to be done by virtue of these presents, and I hereby specifically and completely revoke and terminate any and all powers of attorney of any nature previously executed and granted by me.

IN WITNESS WHEREOF, I have hereunto set my hand this 11 day of January, 1999.

Ada Rae Craig

Ada Rae Craig

STATE OF Utah)
: ss.
COUNTY OF Salt Lake)

The foregoing instrument was acknowledged before me this 11 day of January, 1999, by Ada Rae Craig.

NOTARY PUBLIC
DARRYL L. THAXTON
6000 Eclipse Way
Sandy, UT 84097
My Commission Expires
September 18, 1999
STATE OF UTAH

NOTARY PUBLIC
Residing at: Salt Lake City

My Commission Expires: 9/18/99

Witness

249052.1

Partial Transcript
Bench Trial
September 28 & 29, 2004

PARTIAL TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT D. IRVINE,	:	Case No. 030920001
	:	
Plaintiff,	:	Appellant Court No. 20050138
	:	
vs.	:	
	:	
SHARON CRAIG ANDERSON and COLLEEN CRAIG ANDERSON,	:	
	:	
Defendants.	:	

PARTIAL TRANSCRIPT BENCH TRIAL SEPTEMBER 28 & 29, 2004

BEFORE

THE HONORABLE TIMOTHY R. HANSON

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

offered my sister and I each $10,000 if we would deed the property to him.

Q Okay. My question was didn't your sister threaten you or did she threaten you in any way with not seeing her son Mark?

A She did not.

Q Has your sister ever threatened you to not see her son -

A She had not.

Q - if you didn't cooperate with her?

How many years did you live in the house, approximately with your mother, or from what period of time to what period of time, if that would be easier?

A From 1954 to 1997.

Q You were born when she was living in that house?

A Yes.

Q You didn't pay your mother any money for an interest in the house, did you?

A No.

Q In your responses to the interrogatories, there was a question asked what you paid for the house and the answer that was provided was you paid $10, care, love and affection. And I understand the care, love, and affection part, but actually to be completely accurate you didn't even pay the $10 for an interest in the house; isn't that true?

regarding the specific terms of the Will - or excuse me, of the 1981 deed, did she?

A Only that she wanted Colleen and I to have the property.

Q Now, isn't it true that she wanted you to essentially inherit that home upon her death?

A That's correct.

Q And your understanding was you wouldn't get that inheritance until she died.

A Correct.

Q Did you receive the letter dated February 1999 that we marked as Exhibit 7 that's before you?

A I did.

Q Did that come in the mail to you?

A Yes, it did.

Q Did you contact your mother in response to the letter about the ownership interest in the house?

A No, I did not.

Q In fact you didn't object to your mother in any way about what the ownership interest in response to that letter; isn't that true?

A I -

Q You didn't call your mom up and say, "This isn't right." You didn't call Bob up and say, "That's not true."

A My mother wouldn't understand. I couldn't call my

you the property completely, other than her life estate, did she?

THE COURT: I don't understand the question.

MR. CARTWRIGHT: Okay.

Q (BY MR. CARTWRIGHT) Your mom didn't tell you back around 1981 that she was signing that deed and by signing that deed she was giving away all of her interests, except for her life estate?

A Shar had a third and I had a third and my mom had a third, contingent upon the life estate of the property.

Q Okay, so it was your understanding that, that Sharon owned a third of the property. It was a third hers, correct?

A Well, actually wouldn't become a third of hers.

Q Well now -

A Well I guess what I'm saying. It is a third.

Q Okay.

A Sharon had, did have a third.

Q All right, so it was your perception that Sharon owned a third and you owned a third and your mom owned a third and when she died you and Sharon would own, together you'd own it all?

A With full rights of survivorship Sharon and I would end up with it.

Q Okay. And before your death you each owned a third? Is that correct?

Volume II
Partial Transcript
Bench Trial
September 28 & 29, 2004

VOL II PARTIAL TRANSCRIPT

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT D. IRVINE,	:	Case No. 030920001
	:	
Plaintiff,	:	Appellant Court No. 20050138
	:	
vs.	:	Volume II
	:	
SHARON CRAIG ANDERSON and COLLEEN CRAIG ERICKSON,	:	
	:	
Defendants.	:	

PARTIAL TRANSCRIPT BENCH TRIAL SEPTEMBER 28 & 29, 2004

BEFORE

THE HONORABLE TIMOTHY R. HANSON

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

A I live at 4931 Fairview Drive, Salt Lake City, Utah.

Q What's your background or occupation?

A I'm a general contractor.

Q Now you are a son of Ada Irvine, Ada Craig; is that correct?

A Yes, sir.

Q What I'd like you to do is explain to the Court the relationship with Ada, with you, the children, and the defendants and how the family is put together. So if you could walk over here to the board. Stand up and come over here. Here's a marker and why don't you start with Ada and your dad, where the family starts there.

A My mother and father married. Her maiden name was Ada Rae Snow, later Ada Irvine. They married in I believe in 1935. They had three children.

Q So three children from your mother and Ray?

A Yes.

Q Did they ultimately divorce?

A Yes.

Q Do you remember approximately when that was?

A I believe that was 1974.

Q This was before the home was purchased that we're here talking about today, correct?

A Yes, that's correct.

Q What's the address of that home, do you recall?

A (Inaudible) 251 East 1700 South, Salt Lake City.

Q How was that home acquired originally?

A My father purchased it.

Q Do you recall approximately when that home was purchased by your father?

A 1948.

Q Was this before or after the divorce?

A After.

Q Your mom was later remarried; is that correct?

A She was, I believe in 1949.

Q So the home was purchased after the divorce with Ray but before she subsequently remarried.

A Yes.

Q Who did she remarry?

A Forrest (inaudible).

Q Write his name down. And to be clear, why don't you put a line and put Ada next to that too to show they were married. Did they have - did Forrest and Ada have children together?

A Yes.

Q Which children did they have?

A Mark (inaudible) and Sharon.

Q Write their first names down there. All right. And what happened to this marriage?

A Forrest (inaudible) passed away in 1979.

Q Okay. Put at the bottom there something like Forrest died in 1979. Thank you. That's good for now. You can sit back over here.

Do you know why your father, Ray, purchased the home for Ada after the divorce?

A Well, he had an ex-wife and three children and she didn't work and so he was our support.

Q All right. I'd like to direct your attention to about 1981. Do you recall your mother signing a deed in 1981 on the house that we're talking about?

A Do I recall her signing a deed? No.

Q Are you aware that she did?

A I am.

Q But you didn't know she signed it?

A No, I did not.

MR. CARTWRIGHT: All right. May I approach?

THE COURT: Of course.

Q (BY MR. CARTWRIGHT) I'm showing you what's been marked as Exhibit 1 which purports to be a Quit Claim Deed. Have you seen this document before?

A I have.

Q In what context have you seen the document?

A Pertaining to my mother's needs for moving into the care center and this being the only asset that she had.

was $173.68. She was receiving social security in the amount of, I believe $770 or $80 in 1999. It escalated between 1999 and 2003 when she passed away but I believe it was $780 in 1999.

Q So if you take $780 in social security plus retirement of $173 and the annuity, that's approximately $1,000 a month.

A Yes, sir

Q Did she have any other income besides that?

A No.

Q Did your mother, Ada, did there come a time when she left the home and ended up in the hospital or a care center?

A Yes.

Q When was that?

A Well, in 1998 she, a couple of times, two or three times, as a matter of fact was in either a care center or a rehab area or the hospital. St Mark's Hospital was generally the hospital.

Q So she was in St. Mark's Hospital for health reasons?

A Yes.

Q Do you know what the health reasons were?

A Well, various health reasons. I think she had some stomach problems She had an operation on her stomach at one

point in time, just several reasons, urinary infections seemed to be quite frequent.

Q Did she ever go to a psychiatric unit in the hospital or anything like that?

A Not to my knowledge.

Q You mentioned she was in St. Mark's Hospital. What happened to her after she left St. Mark's Hospital?

A She was in St. Mark's Hospital and was then discharged to a facility on 700 East I believe called the Woodland Care Center. She arrived there in the afternoon one day and I was there as well as the - I don't remember whether both Sharon and Colleen were there or one but I was there and they got her situated in a room, there were others in that room and had her settled down and resting and I left that afternoon. I returned the following morning and she wasn't there where I'd seen her the previous day. So I went to the desk and asked where they had moved Ada Craig to, thinking that they'd moved her to another room or something. They said no, she's not here any more, she's back in the St. Mark's Hospital due to a problem that occurred here last night.

Q A health problem?

A They were a little bit upset with me to begin with. They said that her son, Mark, had some by and apparently had raised some kind of confusion and ruckus because of what he

A Yes.

Q When was that?

A The 11th of January 1999, a week after she'd moved into the Heritage Eastridge.

Q So how did you get the authority to make those decisions?

A The first morning that I visited my mother and she was so unhappy, in fact she'd hurt herself trying to get into use the bathroom, hurt her arm. She just was crying. She didn't want to be there. She wanted to go back where she had been to the Highland Care Center and I said, mom, you know, there's nothing I can do. You've given that authority to someone else and they're making those decisions for you and I can't change that and a lady by the name of Mary Carlson who worked at the Heritage Eastridge was there and she said, "Well, Mrs. Craig, you can make a new power of attorney is you want to. If you don't want to be here you can go to the Highland —

MR. SWENSEN: Objection, Your Honor, hearsay.

THE COURT: Sustained as to what this person at the care center said.

Q (BY MR. CARTWRIGHT) So what did your mother do in response to this conversation?

A She said well then let's change the power of attorney.

MR. SWENSEN: Objection, Your Honor, hearsay.

MR. CARTWRIGHT: Your Honor, here I'm offering this testimony to show her intent in entering into this agreement.

THE COURT: I'm going to allow the testimony as to what was said from any source. It's clearly (inaudible).

Q (BY MR. CARTWRIGHT) I'm showing you what's been marked as Exhibit 8.

THE COURT: Exhibit what?

MR. CARTWRIGHT: Exhibit 8.

Q (BY MR. CARTWRIGHT) Have you seen this document before?

A Yes, sir.

Q What is it?

A It's a durable power of attorney.

Q Do you see the signature line on the document?

A I do.

Q Whose name appears there?

A My mother's.

Q Are you familiar with the signature contained on the durable power of attorney?

A Yes, I am.

Q How are you familiar with this signature here?

A Well, as you can see that's considerably different from the signature that we see on the 1981 deed. As my mother has gotten older and her health was not as good as it

had been in the past, her signature was not as good as it had been in the past.

Q So how do you know that it's your mom's signature?

A I watched her sign it.

MR. CARTWRIGHT: I offer Exhibit 8.

THE COURT: Any objection?

MR. SWENSEN: No objection, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 8 received)

Q (BY MR. CARTWRIGHT) With this power of attorney in hand, what did you do as far as managing her care?

A Well, that first day that I visited her at the Heritage Eastridge and she wanted to change the power of attorney, I immediately went down to Highland Care Center to see if there was space available for her and they said that there was not right at that time but there would be in a couple of weeks. So I went back and told my mother we'd have to endure where she was for a couple of weeks and as soon as that time concluded we'd be able to move where she wanted to be.

Q What role did you have in the preparation or the signing of the power of attorney?

A I contacted an attorney to have it prepared and called for a fellow to come and be the notary and I was there as well and asked the lady at the care center if she would

witness it.

Q How was your mother's eyesight at the time she signed this document?

A My mother had macular degeneration which I have myself and her eyesight was not wonderful. The man, the notary that signed it, read it to her. If I were to just hand it to her, she wouldn't be able to read it without a magnifying glass.

Q Did your mother express any objections or questions regarding the power of attorney?

A No.

Q Could you see whether she wanted to sign it or didn't want to sign it or anything?

A She was anxious to sign it.

Q Why was that?

A Because she knew she could move and be away from there.

Q All right. So you ultimately helped her get back to Highland Ranch?

A Yes.

Q How did she do once she was back at Highland Ranch?

A Very good.

Q How much did Highland Ranch cost?

A Highland Care Center?

Q Excuse me?

A Did you just say Highland Ranch? It's Highland Care Center.

Q Oh, okay, Highland Care.

A How much did it cost?

Q Right.

A When we first moved in the only room that they had available was a room where she shared with another lady and as I recall it was around $4500 a month. After we were there a short time we could see that it would be better if she had her own room. My mother had a hearing problem as well and she loved her TV. She had a large screen TV and she loved her western music, country-western station and for her to enjoy it, the sound had to be up a little louder than maybe for most. The lady that she shared the room with had excellent hearing so that was a problem for her. So we just felt we just would be better off if we just had a private room for her so that she could live and enjoy the things that she wanted.

Q How much did the private room cost?

A It was another $700 or $800 a month. I've forgotten exactly.

Q Were there activities for the residents at the Highland Care Center?

A Yes, many.

Q Did Ada participate in any of those activities?

of the challenge and my mother enjoyed it there.

Q Who paid for Highland Care Center costs while she was there?

A I did.

Q Approximately how much did you spend on your mother's behalf?

A About $175,000 roughly.

Q That was over three or four years?

A Yes sir. I should qualify that and say my wife and I, not just I.

Q I'm showing you what's been marked as Exhibit No. 5. Do you recognize this?

A Yes.

Q What is it?

A That's a list of the expenses that my wife and I contributed to her care. On the right-hand side is another column where my brother contributed to her care as well, my brother Raymond.

Q Does this contain a record of the - well, how did you contribute payments on your mother's behalf?

A I just made checks and deposited to her account. We wanted everything to go through her account that pertained to her.

Q Are those deposits reflected in these records, in Exhibit 5?

A They are.

Q And how did you make expenditures on your mother's behalf?

A With her checking account.

Q And those are also reflected in Exhibit 5?

A Yes, they are.

Q Whose handwriting is on the records here?

A This is my handwriting.

MR. CARTWRIGHT: I offer Exhibit 5.

THE COURT: Any objection?

MR. SWENSEN: No objection.

THE COURT: It will be received.

(Plaintiff's Exhibit 5 received)

Q (BY MR. CARTWRIGHT) Could Ada have paid for own expenses rather than you doing that?

A With her funds?

Q What I mean is, did she have the resources to meet her needs?

A Only with her home.

Q Did Ada ever discuss with you who she believed owned the home?

A She felt she owned the home. She thought it was hers.

MR. SWENSEN: Objection, Your Honor, hearsay.

MR. CARTWRIGHT: Again, Your Honor —

MR. SWENSEN: Hearsay.

THE COURT: Overruled. I'm going to have to have specifics as to what she said, not what he thinks she thought. There's no foundation for that.

Q (BY MR. CARTWRIGHT) All right. Did you have conversations with your mother about who owned the home?

A Many times.

Q When's the first time you recall having that conversation?

A In those first couple of days when we moved from the Heritage Eastridge down to the Highland Care Center.

Q So when she went back to Highland Care Center for the second time?

A Yes.

Q And where was your mother when you were there with her?

A In her room.

Q I said that wrong. Where was your mother when she made those statements?

A In her room.

Q Who was there when those statements were made?

A Oh golly, from time to time there might have been several different people but primarily myself or - primarily myself.

Q On how many occasions did you mom - what did your

mom say when she talked about she owning the home?

A Well, she'd say -

MR. SWENSEN: Objection Your Honor, this would be hearsay.

THE COURT: Overruled.

Continue.

THE WITNESS: My mother when she married Forrest Craig truly thereafter, he started remodeling the home and that went on for 20 years or more, making changes and improvements and my mother lived through all of that, the times when the bathrooms were torn up or the kitchen was torn up or some part of the house and it wouldn't be like a contractor coming in and do it. He did it as he had time and they had the funds to do it but my mother participated in that and she would say many times, that's my home, I'm the one that got up on the sawhorses and sanded the sheetrock, I'm the one that helped paint, I'm the one that helped clean up the mess after all that. That's my home.

Q When did she make those statements? Were those made during remodeling or when we're talking -

A At the Highland Care Center, frequently.

Q Did your mother make a distinction between owning a one third interest with the life estate or owning a home or did she talk about that?

A No.

Q Did she ever talk to you about the 1981 deed that she'd signed?

A When we talked about how we were going to pay for her to be at the Highland Care Center, her only asset was her home. Of course she expected that the girls in her mind, that they would deed that back to her. I contacted an attorney and he had us get a title report. We got a title report and that's when we found out that their names were on the deed. I talked to my mother about it and she said, yes, she remembered doing that. I guess like most of us, she probably never thought that that would happen to her like we don't think it'll happen to us, they'll have a need or we'll have need for those things in our later life but nevertheless she needed it and —

Q Let's focus on the time when she discovered or after you contacted the attorney and you talked specifically about the terms of the 1981 deed. Do you recall any specific statements by your mother about the nature of the interest she held and the daughters held?

A Why it was that way?

Q Right.

A I, of course, asked her why it was done and she told me that he son Mark had married just prior to that and that was an unfortunate situation for him. He had married a girl who was working in a law firm. I don't know whether she

was a paralegal or at least affiliated with a law firm and Mark and this girl were going through a nasty divorce and my mother said they were worried that she would cause them some grief over this house. That's what I was told by my mother.

Q Did the specific context of how much the daughters owned as compared to her, what she owned ever come up in 1999?

A Just that she owned a third of the house plus the life estate, the right to use the house, she couldn't mortgage it or sell it but she had the right to use it or rent it.

Q All right. So she mentioned she owned a third of the house. Did she ever say that she didn't own anything other than a life estate or did she make any statements like that?

A No, no. She felt it was her home.

THE COURT: I'm sorry, sir?

THE WITNESS: She said it was her home.

Q (BY MR. CARTWRIGHT) Did you or your mother take any actions to obtain funds out of the home for her care?

A Yes. We had an attorney contact - Colleen and Sharon had an attorney by this time. When we moved my mother into the Highland Care Center, number one, that very day, Sharon said to me we need to sell the home and I said that's good idea. That's basically what was said.

Q When you refer to Sharon, you're talking about one of the defendants?

A The daughter, Sharon, yes. Please ask the question again.

Q I've forgotten what I asked. I've forgotten where I was at so let me start over there. You were talking about obtaining funds to pay for her care. You talked about Sharon's statement. What did Sharon say?

A We were standing in the hall —

MR. SWENSEN: It's hearsay again.

THE COURT: Pardon me?

MR. SWENSEN: Hearsay.

THE COURT: As to your client?

MR. SWENSEN: Yes.

THE COURT: Overruled.

MR. CARTWRIGHT: Go ahead.

THE WITNESS: We were standing in the hall. We had just moved our mother down there. I was there, my wife was there, my two sons, Sharon and her husband were there. They assisted, helping us take mother down to the Highland Care Center. Sharon was pleased and happy that that was happening because now mom was going to be happy where she was. Of course we knew that Highland Care Center was going to expect to be paid and Sharon just said, "We need to sell the house," and I said "That would be a good idea" and that's what was

said.

Q (BY MR. CARTWRIGHT) Did you follow through with Sharon on selling the house?

A Yes, we talked about it and I got a call from Colleen, telling me never to call Sharon again, never talk to her again.

Q Did she say why?

A In between all the words that I was hearing, I don't recall that she said why.

Q You don't need to say the words but can you be more specific about what you talked about?

A She spent most of her time just calling me names and telling me what she thought of me and so on.

Q Did you ever participate in a Quit Claim Deed from your mother to Carolyn regarding the property?

A I did.

Q Tell me what happened with regard to this transaction.

A Well, when we talked to mother and explained to her the problem with the ownership of the home, she thought that - she said that the girls would be willing to sign it over which they were not but we contacted an attorney and he reviewed the title report and said, well, she owns a third of the house plus the right to use it. She can either live in the house or she can rent the house but she can't sell the

house and so we talked about it and decided, well, maybe we better rent the house and at least get some return to help pay toward mother's expenses.

Q I'm showing you what's been marked as Plaintiff's Exhibit No. 2. Do you recognize that document?

A I do.

Q What is it?

A It's a Quit Claim Deed from my mother to Carolyn Abbott, my sister.

Q Do you know who prepared this deed?

A It was prepared by Larry Moore at Ray, Quinney and Nebeker.

Q This deed has a date at the bottom of January 21, 1999, is that when you recall it being prepared?

A I believe so.

Q Do you see a signature at the bottom of the deed?

A My mother's signature, yes.

Q Did you see her sign that?

A I did.

MR. CARTWRIGHT: I offer Plaintiff's Exhibit 2.

THE COURT: Any objection?

MR. SWENSEN: No objection, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 2 received)

Q (BY MR. CARTWRIGHT) Why was the property deeded to

Carolyn?

A Larry Moore advised my mother and I that she could salvage the one third of the house and probably ought to deed it to another party and he said, Bob, you probably ought to encourage your mother not to deed it to you because you have power of attorney and it would appear as though you were trying to take a part of her house and he said, you have other brothers and sisters and I said, yes, I have a brother Ray and a sister Carolyn. My brother lives in California, my sister lives in Salt Lake. And he said I'd advise her to deed it to your sister. So we talked to mother about it and she said that would be fine, that's what we ought to do and so that's what happened.

Q Who was present at the time that Ada signed the Quit Claim Deed to Carolyn?

A Myself, of course my mother and myself and Daryl Thaxton who is a notary public.

Q Anyone else in the room that you remember?

A I don't remember anyone else being in the room, whether there was a nurse's aid or not I don't recall. They were always in or out but I don't recall anyone else.

Q Do you remember approximately what time of day it was when she signed it?

A Oh golly, I don't.

Q Do you remember Ada's demeanor at the time she

signed the deed?

A She was fine.

Q How did she know what she was signing if she had difficulty reading?

A It was read to her.

Q Difficulty seeing?

A It was read to her.

Q Do you recall who read the deed to her?

A I believe I read the Quit Claim Deed to her.

Q Could you tell whether your mother knew where she was?

A Oh, she knew where she was.

Q Could you tell whether she knew what she was doing?

A She knew what she was doing.

Q How could you tell?

A My mother was sharp.

Q Was she sharp on the day she signed the deed?

A Yes, she was.

Q Now, you ultimately received an interest in the house; is that correct?

A I did.

Q Could you explain how that happened?

A Well, three years later, I believe three years later, my sister Carolyn because we'd never gotten any cooperation from the others, we continued to pay for mother's

care and Carolyn said, "You ought to have that portion of the house, Bob." And so she deeded it to me.

Q Did you pay any money for that?

A No.

Q Did Carolyn pay any money to Ada for the Quit Claim Deed that went to her?

A No.

Q What was the understanding - well, are you aware of what Ada's understanding was of why she was signing her interest away to Carolyn?

A She was signing her interest away to protect it, frankly with the intent of all of the girls signing it all back to her so that we could use those funds to care for her.

Q Now, how do you know that's what your mother's intentions were?

A Because we discussed it, talked about it.

Q I'm showing you what's been marked as Plaintiff's Exhibit No. 3. Do you recognize that document?

A I do.

Q What is it?

A It's a warranty deed from my sister Carolyn to me for the third of the property that had been deeded from my mother to her.

Q Do you see the signature down there that says Carolyn Abbott below it?

A I do.

Q Do you know whose signature that is?

A My sister Carolyn's.

Q How do you know that?

A Well, I was there to witness it. I saw her sign her it.

MR. CARTWRIGHT: I offer Plaintiff's Exhibit 3.

THE COURT: Any objection?

MR. SWENSEN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 3 received)

Q (BY MR. CARTWRIGHT) Do you know whether your mother ever contacted her daughters either orally or in writing regarding everyone's claims to the property?

A Yes, she did. She contacted them both orally and in writing.

Q Let's talk about the oral part first. Do you recall any specific occasion when Ada contacted Sharon or Colleen?

A Well, she talked to them on the telephone several times and would ask and they didn't want to talk about it. They said it was a problem they didn't want to discuss.

Q Now how do you know that she called them?

A I was there a time or two when she had but she would tell me about the calls as well.

A February 2nd, 1999.

Q Could you turn to Page 2 of that? What does that say in the handwriting on Page 2?

A All my love, mom.

Q Do you know whose handwriting that is?

A That's my mother's.

Q How do you know that?

A I watched her sign it.

Q Would you explain how this letter came to be?

A As I mentioned a moment ago, she wasn't making any progress in talking to them and so we discussed maybe writing a letter and sending it to them so that she could have some of these things that she wanted and needed and discuss how her affairs needed to be taken care of. That's how it came about.

Q On the first page of the letter, in almost the middle of the first paragraph, there is a sentence that begins, "At the time" do you see that?

A Say that again.

Q "At the time I signed". Could you read that sentence out loud please?

A "At the time I signed a Quit Claim deeding one third of my home to each of you I was concerned about Mark's wife causing some kind of a problem that could place my house in jeopardy."

Q Do you know what that sentence refers to?

A Well, just as I mentioned earlier, Mark has married a girl that had looked for a law firm and they were going through a nasty problem and I don't know whether it was my mother's idea or Colleen or Sharon's idea to do this deed but the story that I was told by my mother was that there was concern about Mark's wife or ex-wife-to-be getting involved in the house and causing some problems for them.

Q All right. Now the letter I see is typed and I assume your mother didn't type it?

A No, she did not.

Q Explain how this went from your conversation to the final form.

A Well, my mother and I composed the letter there in her room and then my son Scott typed it for her.

Q Then what did Scott do with the type written note?

A He gave it back to - I don't know whether he gave it to me or my mother but then we read it and reviewed it and my mother approved it and signed it.

Q Do you recall any specific comments your - who read it after it was typed up?

A I believe my son read it and I believe I read it as well.

Q I mean-

A To her

Q Oh, to her?

A Uh-huh (affirmative).

Q Do you remember any specific comments that your mom had once it was read to her by either you or Scott?

A No, she was satisfied with it and as you can note by the way she signed it, all my love, mom, my mother loved all of her children and grandchildren.

Q Do you know what happened to this letter after your mother signed it?

A We mailed it certified mail to Colleen and Sharon and then their attorney asked for copies and he was given copies as well.

MR. CARTWRIGHT: Okay. Offer Exhibit 7.

THE COURT: Any objection?

MR. SWENSEN: No objection, Your Honor.

THE COURT: Received.

(Plaintiff's Exhibit 7 received)

Q (BY MR. CARTWRIGHT) You had mentioned earlier about how Sharon and Colleen were not selling, did not agree to sell the house or their interest in the house or whatever.

A Right.

Q Do you recall any response of your mother specifically to Sharon not agreeing to convey whatever interest in the house?

A She said, "I could understand Colleen acting this

way but I can't understand Sharon treating me this way."

Q In regards to your sister, Carolyn, do you owe her any money?

A No.

Q Owe her any debts or obligations at all?

A No.

Q Does she owe anything to you?

A No.

Q Has your mother Ada ever told you that, other than her life estate, she gave the rest of the interest in the house to anyone?

A No.

MR. CARTWRIGHT: That's all I have.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. SWENSEN:

Q Mr. Irvine, I just have a couple of questions to clarify some points here.

A Okay.

Q In the diagram that you've put on the board you indicated that the divorce occurred in 1944. My recollection is you said the house was purchased in 1945.

A '48.

Q 1948?

A I'm sorry, '48.

Q Did he know your mother had a home?

A Yes, I told him that she did.

Q So you broached the subject with him about your mother's home?

A Yes, uh-huh (affirmative). My mother and I had talked about it, so I explained to him my mother had a home and we had the need of taking care of her now and what were we to do?

Q And what was the object there? So that you could assist your mother —

A Sell the home, yes.

Q If the intent then was to sell the home, why did your mother convey her third interest to Carolyn?

A At the advice of Larry Moore, that to protect that third interest she could deed that to another one of her children or someone else and salvage that third. It appeared that the others were not going to participate so it was his advice.

Q Okay, sell (inaudible)?

A Hopefully that we could have sold that one third and they would have bought it out, that they would have bought that third from their mother.

Q Okay. If the object was to use the home for Ada's support, why didn't she receive any consideration for the conveyance to Carolyn?

A That's what I was told.

Q Do you know when he was divorced?

A I don't recall.

Q Do you know when he was married?

A I don't.

Q Do you know if he was even married at this time?

A No I don't.

MR. SWENSEN: Thank you, Mr. Irvine, that's all.

THE COURT: Redirect?

MR. CARTWRIGHT: Just one issue.

REDIRECT EXAMINATION

BY MR. CARTWRIGHT:

Q In regards to when the property was quit claimed from Ada to her daughter Carolyn, was Carolyn buying that property?

A No, she was not buying it.

Q Why did it go to her?

A In hopes that we would be able to sell that portion of the home to acquire funds for my mother's care.

MR. CARTWRIGHT: That's all. Thank you.

THE COURT: Anything further Mr. Swensen?

MR. SWENSEN: Yes Your Honor, just a clarification on that same matter.

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Findings of Fact,
Conclusions of Law
Entered December 6, 2004

FINDINGS OF FACT

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT IRVINE, Plaintiff, vs. SHARON CRAIG ANDERSON and COLLEEN CRAIG ERICKSON, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 030920001 Judge Hanson

The above-entitled matter was tried to the Court, the Honorable Timothy R. Hanson, sitting without a jury on September 28 and 29th, 2004. The plaintiff, Robert D. Irvine, was represented by John Burton Anderson and Joe Cartwright. The defendants, Sharon Craig Anderson and Colleen Craig Erickson were represented by James G. Swensen, Jr. The Court heard the testimony of a number of witnesses, received and reviewed numerous written exhibits, and evaluated the arguments of counsel. The Court announced its decision on this case on October 14, 2004. Being fully advised and

pursuant to Rule 52 of the Utah Rules of Civil Procedure, and based upon such testimony and evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. There were two main issues presented at trial by the parties to the Court. First, what interest, if any, did Ada R. Craig ("Craig") have in the real property after executing the January 19, 1981 deed; and second, if Craig owned a joint tenancy interest in the real property following the execution of the January 19, 1981 deed, was she competent to transfer her interest in the property to her other daughter, Carolyn Abbott.

2. Based upon the strict application of the words of the deed, the Court finds that Ada R. Craig conveyed to herself and to her daughters Sharon Craig Anderson and Colleen Craig Erickson the property in joint tenancy, with full rights of survivorship, and in addition to her one-third joint tenancy interest, Craig also granted to herself a life estate in the real property.

3. The Court also finds that Ada Craig intended to grant under herself and to her daughters a joint tenancy interest in the property, and addition to her one-third joint tenancy interest, Craig also intended to grant to herself a life estate in the real property.

4. There was not any believable or persuasive evidence that Ada Craig intended to abandon control of the day to day operations or control of the property while Ada was alive. The evidence suggests that she intended to retain control over the property.

5. Following the execution of the 1981 deed, Ada Craig, Sharon Anderson and Colleen Erickson shared a one-third interest in the totality of the property as joint tenants, with rights of survivorship.

6. Ada Craig retained a joint tenancy interest so that if one or both of her daughters predeceased her, a share or all of the property would return to Craig, and not go to another family member of the co-owner daughters. She was interested in giving the property to her daughters if she died, but was not interested in giving the property to one of her daughters' heirs if a daughter predeceased her. She therefore intended to retain a joint tenancy interest in the property.

7. The life estate Craig retained in addition to her joint tenancy interest was also retained for another important purpose: By creating a life estate only for herself, Ada intended to retain day-to-day control of the property. The "reserving a life estate only" language in the 1981 deed was intended to reserve the life estate only in the name of Ada, and not in the name of her daughters, which excludes her two daughters from control of the property while Ada Craig was alive.

8. The evidence shows that Ada Craig said she owned the property following the 1981 deed, and also that Colleen Erickson testified that this was a 1/3rd, 1/3rd, 1/3rd ownership relationship between Ada, Colleen Erickson, and Sharon Anderson. Other witnesses who testified for plaintiff supported this interpretation of Ada Craig's ownership intent.

9. Whether one looks to Ada's intent, or looking at the actual language of the 1981 deed, the result is the same, as specified above.

10. The Court finds that to the extent a joint tenancy interest and a life estate interest might somehow be inconsistent, which the Court does not believe they are, the joint tenancy estate is the greater estate than the life estate in this circumstance, and the life estate would therefore merge into the joint tenancy estate.

11. Defendants have the burden of proving their claim by a preponderance of the evidence that Ada Craig was not competent to execute the Quit Claim Deed from Ada Craig to Carolyn Abbot on January 21, 1999 or the Last Will and Testament of Ada Craig dated February 10, 1999.

12. The evidence does not support defendants' claims that Ada Craig was not competent in the signing of the 1999 documents. This evidence is presented by credible, independent, third-party witnesses, who did not demonstrate any bias or pecuniary interest. Such witnesses have shown that when the 1999 documents were signed, Ada Craig was mentally competent. She was active in the health care center activities, was able communicated her needs and desires, was mentally sharp, and did not demonstrate confusion during the periods of time the 1999 documents were signed.

13. There is compelling evidence that supports the conclusion that Ada Craig was competent, and no compelling evidence that she was not competent when she signed the 1999 documents.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court makes the following Conclusions of Law:

1. Ada Craig conveyed to Carolyn Abbott her one-third joint tenancy interest in the real property located at 251 E, 1700 South, Salt Lake City, Utah, and Carolyn Abbott subsequently transferred this one-third interest to plaintiff Robert Irvine.

2. The January 21, 1999 Quit Claim Deed signed by Ada Craig to Carolyn Abbot and the February 10, 1999 Last Will and Testament are valid, legal instruments and express the will of Ada Craig to dispose of her property as she intended.

3. Defendants' claim that the 1999 documents should be set aside based upon a lack of competency is not supported by the evidence, and such claim is dismissed.

4. The real property jointly owned by plaintiff and defendants should be partitioned and be sold.

5. Plaintiff Robert Irvine should be appointed as Receiver to take reasonable and proper steps to make sure the property is in a sellable condition, sell the property, and divide the net sales proceeds between each of the three owners. Whatever reasonable expenses are necessary to make the property sellable for the benefit of each of the parties should be deduced from the sales proceeds, and the balance should be divided equally between Robert Irvine, Sharon Craig Anderson, and Colleen Craig Erickson.

6. Each party is to bear their own attorney's fees incurred in connection with this action.

7. Plaintiff is entitled to Rule 54B costs.

8. Defendants' counterclaims are dismissed.

9. There is no evidence supporting an Order for Accounting as requested by defendants, and such request is therefore denied. However, Robert Irvine shall provide an accounting as to the sale of the real property and distribution of the proceeds.

DATED this 6 day of ~~November~~ December, 2004.

BY THE COURT:

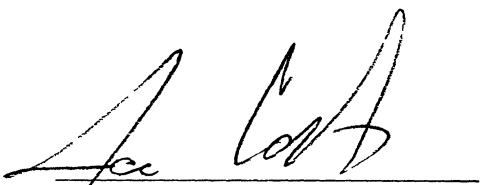
Timothy R. Hanson
District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH
DATE
DEPUTY COURT CLERK

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of Nov, 2004, I served a true and correct copy of the foregoing document upon the person(s) named below by placing such document in the United States mail, postage prepaid, addressed to the following:

James g. Swensen, Jr.
Attorney for Defendants
SWENSEN & ANDERSON PLLC
136 South Main Street, Suite 318
Salt Lake City, UT 84101



Joe Cartwright

Motion for Court Approval of Real Property Dated February 4, 2005

MOTION RE REAL PROP

John Burton Anderson, #0092
4001 South 700 East, Suite 500
Salt Lake City, UT 84107
Telephone: (801) 264-6653 FAX 264-6601
Co-Counsel for Plaintiff

Joe Cartwright, #7697
CARTWRIGHT LAW FIRM, P.C.
Wells Fargo Center
299 South Main Street, Suite 1700
Salt Lake City, UT 84111
Telephone: (801) 363-5255
Co-Counsel for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT IRVINE, Plaintiff, vs. SHARON CRAIG ANDERSON and COLLEEN CRAIG ERICKSON, Defendants.	**MOTION FOR COURT APPROVAL OF REAL PROPERTY** **(Expedited Ruling Requested)** Civil No. 030920001 Judge Hanson

Robert Irvine, as Trustee and Receiver of the real property subject to this action, respectfully submits this motion for Court approval of the sale of the real property under the terms specified below.

FACTS

1. This Court has appointed Robert Irvine as receiver of the property and directed Mr Irvine to sell the property and divide the proceeds equally between the parties in this action.

2. Mr. Irvine obtained an appraisal of the property, and the appraisal showed an approximate value of $220,000.

3. Mr. Irvine has worked diligently to market the property, and received an offer to buy the property. After offers and counteroffers, the agreed upon purchase price of the property will be Two Hundred Twelve Thousand Five Hundred Dollars ($212,500.00). A copy of the Real Estate Purchase Contract reflecting this agreement is attached hereto as Exhibit A.

4. Based upon the appraisal, the condition of the property, and the general market in Salt Lake City, Mr. Irvine believes that the pending offer is a good and fair price for the sale of the real property.

Based upon these facts, Mr. Irvine requests that the Court approve the pending sale of the property as reflected in the attached Real Estate Purchase Contract.

REQUEST FOR EXPEDITED RULING

Because time is of the essence on this pending sale, Mr. Irvine requests an expedited ruling to approve the sale.

Dated this 4th day of February, 2005.

CARTWRIGHT LAW FIRM, P.C.

Joe Cartwright, Attorney for
Robert Irvine

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2005, I served a true and correct copy of the foregoing document upon the person(s) named below by placing such document in the United States mail, postage prepaid, addressed to the following:

James G. Swensen, Jr.
Swensen & Andersen, PLLC
136 South Main St., Suite 318
Salt Lake City, UT 84101

And also by faxing a copy of this motion to Mr. Swensen at (801) 364-7510.

Joe Cartwright

REAL ESTATE PURCHASE CONTRACT

This is a legally binding contract. Utah law requires real estate licensees to use this form. Buyer and Seller, however, may agree to alter or delete its provisions or to use a different form. If you desire legal or tax advice, consult your attorney or tax advisor.

EARNEST MONEY RECEIPT

Buyer June Skollingsberg offers to purchase the Property described below and hereby delivers to the Brokerage, as Earnest Money, the amount of $2000 in the form of personal check which, upon Acceptance of this offer by all parties (as defined in Section 23), shall be deposited in accordance with state law.

Received by: [signature] on 1.25.05 (Date)
(Signature of agent/broker acknowledges receipt of Earnest Money)

Brokerage: Lewis, Wolcott, & Dornbush/Branch Phone Number: 801-467-2100

OFFER TO PURCHASE

1. PROPERTY: 251 E 1700 South also described as: Tax ID# 16.18.181.013 City of Salt Lake City County of Salt Lake State of Utah, ZIP 84115 (the "Property").

1.1 Included Items. Unless excluded herein, this sale includes the following items if presently owned and attached to the Property: plumbing, heating, air conditioning fixtures and equipment; ceiling fans; water heater; built-in appliances; light fixtures and bulbs; bathroom fixtures; curtains, draperies and rods; window and door screens; storm doors and windows; window blinds; awnings; installed television antenna; satellite dishes and system; permenently affixed carpets; automatic garage door opener and accompanying transmitter(s); fencing; and trees and shrubs. The following items shall also be included in this sale and conveyed under separate Bill of Sale with warranties as to title: 2 ranges, 1 refrigerators, 2 dishwasher – all items as seen in property on 1.23.05

1.2 Excluded Items. The following items are excluded from this sale: N/A

1.3 Water Rights. The following water rights are included in this sale: all appurtenant rights to the property

2. PURCHASE PRICE The purchase price for the Property is $205000

2.1 Method of Payment. The purchase price will be paid as follows:

$2000 (a) Earnest Money Deposit. Under certain conditions described in this Contract, THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE.

~~$184500~~ $164,000 (b) New Loan. Buyer agrees to apply for a new loan as provided in Section 2.3. Buyer will apply for one or more of the following loans: [X] CONVENTIONAL [ ] FHA [ ] VA
[ ] OTHER (specify) _____
If an FHA/VA loan applies, see attached FHA/VA Loan Addendum.
If the loan is to include any particular terms, then check below and give details:
[ ] SPECIFIC LOAN TERMS _____

$_____ (c) Loan Assumption Addendum (see attached Assumption Addendum, if applicable)
$_____ (d) Seller Financing (see attached Seller Financing Addendum, if applicable)
$_____ (e) Other (specify) _____

$39,000 ~~$18500~~ (f) Balance of Purchase Price in Cash at Settlement
$205000 PURCHASE PRICE. Total of lines (a) through (f)

2.2 Financing Condition. (check applicable box)

(a) [X] Buyer's obligation to purchase the Property IS conditioned upon Buyer qualifying for the applicable loan(s) referenced in Section 2.1(b) or (c)(the "Loan"). This condition is referred to as the "Financing Condition."

(b) [ ] Buyer's obligation to purchase the Property IS NOT conditioned upon Buyer qualifying for a loan. Section 2.3 does not apply.

2.3 Application for Loan.

(a) Buyer's duties. No later than the Loan Application & Fee Deadline referenced in Section 24(a), Buyer shall apply for the Loan. "Loan Application" occurs only when Buyer has: (i) completed, signed, and delivered to the lender (the "Lender") the initial loan application and documentation required by the Lender; and (ii) paid all loan application fees as required by the Lender. Buyer agrees to diligently work to obtain the Loan. Buyer will promptly provide the Lender with any additional documentation as required by the Lender.

(b) Procedure if Loan Application is denied. If Buyer receives written notice from the Lender that the Lender does

not approve the Loan (a "Notice of Loan Denial"), Buyer shall, no later than three calendar days thereafter, provide a copy to Seller. Buyer or Seller may, within three calendar days after Seller's receipt of such notice, cancel this Contract by providing written notice to the other party. In the event of a cancellation under this Section 2.3(b): (i) if the Notice of Loan Denial was received by Buyer no later than the Loan Denial Deadline referenced in Section 24(d), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Loan Denial was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.3(b) shall have no effect on the Financing Condition set forth in Section 2.2(a). Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

2.4 Appraisal Condition. Buyer's obligation to purchase the Property [X] IS [ ] IS NOT conditioned upon the Property appraising for not less than the Purchase Price. This condition is referred to as the "Appraisal Condition". If the Appraisal Condition applies and the Buyer receives written notice from the Lender that the Property has appraised for less than the Purchase Price (a "Notice of Appraised Value"), Buyer may cancel this Contract by providing a copy of such written notice to Seller no later than three days after Buyer's receipt of such written notice. In the event of a cancellation under this Section 2.4: (i) if the Notice of Appraised Value was received by Buyer no later than the Appraisal Deadline referenced in Section 24(e), the Earnest Money Deposit shall be returned to Buyer; (ii) if the Notice of Appraised Value was received by Buyer after that date, the Earnest Money Deposit shall be released to Seller, and Seller agrees to accept as Seller's exclusive remedy, the Earnest Money Deposit as liquidated damages. A failure to cancel as provided in this Section 2.4 shall be deemed a waiver of the Appraisal Condition by Buyer. Cancellation pursuant to the provisions of any other section of this Contract shall be governed by such other provisions.

3. SETTLEMENT AND CLOSING. Settlement shall take place on the Settlement Deadline referenced in Section 24(f), or on a date upon which Buyer and Seller agree in writing. "Settlement" shall occur only when all of the following have been completed: (a) Buyer and Seller have signed and delivered to each other or to the escrow/closing office all documents required by this Contract, by the Lender, by written escrow instructions or by applicable law; (b) any monies required to be paid by Buyer under these documents (except for the proceeds of any new loan) have been delivered by Buyer to Seller or to the escrow/closing office in the form of collected or cleared funds; and (c) any monies required to be paid by Seller under these documents have been delivered by Seller to Buyer or to the escrow/closing office in the form of collected or cleared funds. Seller and Buyer shall each pay one-half (½) of the fee charged by the escrow/closing office for its services in the settlement/closing process. Taxes and assessments for the current year, rents, and interest on assumed obligations shall be prorated at Settlement as set forth in this Section. Tenant deposits (including, but not limited to, security deposits, cleaning deposits and prepaid rents) shall be paid or credited by Seller to Buyer at Settlement. Prorations set forth in this Section shall be made as of the Settlement Deadline date referenced in Section 24(f), unless otherwise agreed to in writing by the parties. Such writing could include the settlement statement. The transaction will be considered closed when Settlement has been completed, and when all of the following have been completed: (i) the proceeds of any new loan have been delivered by the Lender to Seller or to the escrow/closing office; and (ii) the applicable Closing documents have been recorded in the office of the county recorder. The actions described in parts (i) and (ii) of the preceding sentence shall be completed within four calendar days of Settlement.

4. POSSESSION. Seller shall deliver physical possession to Buyer within: [ ] _____ hours [ ] _____ days after closing; [X] Other (specify) RECORDING

5. CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract:
[ ] Seller's Initials [ ] Buyer's Initials

The Listing Agent, Sandra Gillen / Launie Belnap, represents [X] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Listing Broker, Jayson C Critchfield, represents [X] Seller [ ] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Selling Agent, Jaymison L Petersen, represents [ ] Seller [X] Buyer [ ] both Buyer and Seller as a Limited Agent;

The Selling Broker, Linda Wolcott, represents [ ] Seller [X] Buyer [ ] both Buyer and Seller as a Limited Agent;

6. TITLE INSURANCE. At Settlement, Seller agrees to pay for a standard-coverage owner's policy of title insurance insuring Buyer in the amount of the Purchase Price. Any additional title insurance coverage shall be at Buyer's expense.

7. SELLER DISCLOSURES. No later than the Seller Disclosure Deadline referenced in Section 24(b), Seller shall provide to Buyer the following documents which are collectively referred to as the "Seller Disclosures":
(a) a Seller property condition disclosure for the Property, signed and dated by Seller;
(b) a commitment for the policy of title insurance;

(c) a copy of any leases affecting the Property not expiring prior to Closing;
(d) written notice of any claims and/or conditions known to Seller relating to environmental problems and building or zoning code violations; and
(e) Other (specify) Documentation of Zoning from Salt Lake City

8. BUYER'S RIGHT TO CANCEL BASED ON EVALUATIONS AND INSPECTIONS. Buyer's obligation to purchase under this Contract (check applicable boxes):
(a) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;
(b) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;
(c) [ ] IS [X] IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor ("Survey");
(d) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the cost, terms and availability of homeowner's insurance coverage for the Property;
(e) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify)
Pest Inspection & any other tests requested by the professional home inspector
If any of the above items are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply, otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as the "Evaluations & Inspections." Unless otherwise provided in this Contract, the Evaluations & Inspections shall be paid for by Buyer and shall be conducted by individuals or entities of Buyer's choice. Seller agrees to cooperate with the Evaluations & Inspections and with the walk-through inspection under Section 11.

8.1 Evaluations & Inspections Deadline. No later than the Evaluations & Inspections Deadline referenced in Section 24(c) Buyer shall: (a) complete all Evaluations & Inspections; and (b) determine if the Evaluations & Inspections are acceptable to Buyer.

8.2 Right to Cancel or Object. If Buyer determines that the Evaluations & Inspections are unacceptable, Buyer may, no later than the Evaluations & Inspections Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Evaluations & Inspections Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Evaluations & Inspections, the Evaluations & Inspections shall be deemed approved by Buyer.

8.4 Response by Seller. If Buyer provides written objections to Seller, Buyer and Seller shall have seven calendar days after Seller's receipt of Buyer's objections (the "Response Period") in which to agree in writing upon the manner of resolving Buyer's objections. Except as provided in Section 10.2, Seller may, but shall not be required to, resolve Buyer's objections. If Buyer and Seller have not agreed in writing upon the manner of resolving Buyer's objections, Buyer may cancel this Contract by providing written notice to Seller no later than three calendar days after expiration of the Response Period; whereupon the Earnest Money Deposit shall be released to Buyer. If this Contract is not canceled by Buyer under this Section 8.4, Buyer's objections shall be deemed waived by Buyer. This waiver shall not affect those items warranted in Section 10.

9. ADDITIONAL TERMS. There [X] ARE [ ] ARE NOT addenda to this Contract containing additional terms. If there are, the terms of the following addenda are incorporated into this Contract by this reference: [X] Addendum No. One [ ] Seller Financing Addendum [ ] FHA/VA Loan Addendum [ ] Assumption Addendum [X] Lead-Based Paint Disclosure & Acknowledgement (in some transactions this disclosure is required by law) [ ] Lead-Based Paint Addendum (in some transactions this addendum is required by law) [ ] Other (specify): _____

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10. SELLER WARRANTIES AND REPRESENTATIONS.

10.1 Condition of Title. Seller represents that Seller has fee title to the Property and will convey good and marketable title to Buyer at Closing by general warranty deed. Buyer agrees, however, to accept title to the Property subject to the following matters of record: easements, deed restrictions, CC&R's (meaning covenants, conditions and restrictions), and rights-of-way, and subject to the contents of the Commitment for Title Insurance as agreed to by Buyer under Section 8. Buyer also agrees to take the Property subject to existing leases affecting the Property and not expiring prior to Closing. Buyer agrees to be responsible for taxes, assessments, homeowners association dues, utilities, and other services provided to the Property after Closing. Except for any loan(s) specifically assumed by Buyer under Section 2.1(c), Seller will cause to be paid off by Closing all mortgages, trust deeds, judgments, mechanic's liens, tax liens and warrants. Seller will cause to be paid current by Closing all assessments and homeowners association dues.

10.2 Condition of Property. Seller warrants that the Property will be in the following condition ON THE DATE SELLER DELIVERS PHYSICAL POSSESSION TO BUYER:
(a) the Property shall be broom-clean and free of debris and personal belongings. Any Seller or tenant

moving-related damage to the Property shall be repaired at Seller's expense;

(b) the heating, cooling, electrical, plumbing and sprinkler systems and fixtures, and the appliances and fireplaces will be in working order and fit for their intended purposes;

(c) the roof and foundation shall be free of leaks known to Seller;

(d) any private well or septic tank serving the Property shall have applicable permits, and shall be in working order and fit for its intended purpose; and

(e) the Property and improvements, including the landscaping, will be in the same general condition as they were on the date of Acceptance.

10.3 Home Warranty Plan. The "Home Warranty Plan" referenced in this Section 10.3 is separate from the warranties provided by Seller under Sections 10.1 and 10.2 above. (Check applicable boxes):
A one-year Home Warranty Plan [ ] WILL [X] WILL NOT be included in this transaction. If included, the Home Warranty Plan shall be ordered by [ ] Buyer [ ] Seller and shall be issued by a company selected by [ ] Buyer [ ] Seller. The cost of the Home Warranty Plan shall not exceed $ _____ and shall be paid for at Settlement by [ ] Buyer [ ] Seller.

11. WALK-THROUGH INSPECTION. Before Settlement, Buyer may, upon reasonable notice and at a reasonable time, conduct a "walk-through" inspection of the Property to determine only that the Property is "as represented," meaning that the items referenced in Sections 1.1, 8.4 and 10.2 ("the Items") are respectively present, repaired/changed as agreed, and in the warranted condition. If the Items are not as represented, Seller will, prior to Settlement, replace, correct or repair the Items or, with the consent of Buyer (and Lender if applicable), escrow an amount at Settlement to provide for the same. The failure to conduct a walk-through inspection, or to claim that an item is not as represented, shall not constitute a waiver by Buyer of the right to receive, on the date of possession, the items as represented.

12. CHANGES DURING TRANSACTION. Seller agrees that from the date of Acceptance until the date of Closing, none of the following shall occur without the prior written consent of Buyer: (a) no changes in any existing leases shall be made; (b) no new leases shall be entered into; (c) no substantial alterations or improvements to the Property shall be made or undertaken; and (d) no further financial encumbrances to the Property shall be made.

13. AUTHORITY OF SIGNERS. If Buyer or Seller is a corporation, partnership, trust, estate, limited liability company, or other entity, the person executing this Contract on its behalf warrants his or her authority to do so and to bind Buyer and Seller.

14. COMPLETE CONTRACT. This Contract together with its addenda, any attached exhibits, and Seller Disclosures, constitutes the entire Contract between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings or contracts between the parties. This Contract cannot be changed except by written agreement of the parties.

15. DISPUTE RESOLUTION. The parties agree that any dispute, arising prior to or after Closing, related to this Contract (check applicable box)

[X] SHALL

[ ] MAY AT THE OPTION OF THE PARTIES

first be submitted to mediation. If the parties agree to mediation, the dispute shall be submitted to mediation through a mediation provider mutually agreed upon by the parties. Each party agrees to bear its own costs of mediation. If mediation fails, the other procedures and remedies available under this Contract shall apply. Nothing in this Section 15 shall prohibit any party from seeking emergency equitable relief pending mediation.

16. DEFAULT. If Buyer defaults, Seller may elect either to retain the Earnest Money Deposit as liquidated damages, or to return it and sue Buyer to specifically enforce this Contract or pursue other remedies available at law. If Seller defaults, in addition to return of the Earnest Money Deposit, Buyer may elect either to accept from Seller a sum equal to the Earnest Money Deposit as liquidated damages, or may sue Seller to specifically enforce this Contract or pursue other remedies available at law. If Buyer elects to accept liquidated damages, Seller agrees to pay the liquidated damages to Buyer upon demand. It is agreed that denial of a Loan Application made by the Buyer is not a default and is governed by Section 2.3(b).

17. ATTORNEY FEES AND COSTS. In the event of litigation or binding arbitration to enforce this Contract, the prevailing party shall be entitled to costs and reasonable attorney fees. However, attorney fees shall not be awarded for participation in mediation under Section 15.

18. NOTICES. Except as provided in Section 23, all notices required under this Contract must be: (a) in writing; (b) signed by the party giving notice; and (c) received by the other party or the other party's agent no later than the applicable date referenced in this Contract.

19. ABROGATION. Except for the provisions of Sections 10.1, 10.2, 15 and 17 and express warranties made in this Contract, the provisions of this Contract shall not apply after Closing.

20. RISK OF LOSS. All risk of loss to the Property, including physical damage or destruction to the Property or its improvements due to any cause except ordinary wear and tear and loss caused by a taking in eminent domain, shall be borne by Seller until the transaction is closed.

21. TIME IS OF THE ESSENCE. Time is of the essence regarding the dates set forth in this Contract. Extensions must be agreed to in writing by all parties. Unless otherwise explicitly stated in this Contract: (a) performance under each Section of this Contract which references a date shall absolutely be required by 5:00 P.M. Mountain Time on the stated date; and (b) the term "days" shall mean calendar days and shall be counted beginning on the day following the event which triggers the timing requirement (i.e., Acceptance, Notice of Loan Denial, etc.). Performance dates and times referenced herein shall not be binding upon title companies, lenders, appraisers and others not parties to this Contract, except as otherwise agreed to in writing by such non-party.

22. FAX TRANSMISSION AND COUNTERPARTS. Facsimile (fax) transmission of a signed copy of this Contract, any addenda and counteroffers, and the retransmission of any signed fax shall be the same as delivery of an original. This Contract and any addenda and counteroffers may be executed in counterparts.

23. ACCEPTANCE. "Acceptance" occurs when Seller or Buyer, responding to an offer or counteroffer of the other: (a) signs the offer or counteroffer where noted to indicate acceptance; and (b) communicates to the other party or to the other party's agent that the offer or counteroffer has been signed as required.

24. CONTRACT DEADLINES. Buyer and Seller agree that the following deadlines shall apply to this Contract:

(a) Loan Application & Fee Deadline	Complete	(Date)
(b) Seller Disclosure Deadline	One week	(Date)
(c) Evaluations & Inspections Deadline	two weeks	(Date)
(d) Loan Denial Deadline	three weeks	(Date)
(e) Appraisal Deadline	two weeks	(Date)
(f) Settlement Deadline	four weeks	(Date)

From date of written notice of court approval.

25. OFFER AND TIME FOR ACCEPTANCE. Buyer offers to purchase the Property on the above terms and conditions. If Seller does not accept this offer by: 8:00 [ ] AM [X] PM Mountain Time on ~~[illegible]~~ for court approval (Date), this offer shall lapse; and the Brokerage shall return the Earnest Money Deposit to Buyer.

June D Skolliingsberg 1/25/05 Jan 26, 2005

(Buyer's Signature) (Offer Date) (Buyer's Signature) (Offer Date)

The later of the above Offer Dates shall be referred to as the "Offer Reference Date"

June Skolliingsberg	4362 S Deno Dr. West Valley City, UT	84120	801.339.0229
(Buyers' Names) (PLEASE PRINT)	(Notice Address)	(Zip Code)	(Phone)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[ ] **ACCEPTANCE OF OFFER TO PURCHASE:** Seller Accepts the foregoing offer on the terms and conditions specified above.

[X] **COUNTEROFFER:** Seller presents for Buyer's Acceptance the terms of Buyer's offer subject to the exceptions or modifications as specified in the attached ADDENDUM NO. Two

1-26-05 7:00 p.m.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

Robert Irving

(Sellers' Names) (PLEASE PRINT) (Notice Address) (Zip Code) (Phone)

[ ] **REJECTION:** Seller rejects the foregoing offer.

(Seller's Signature) (Date) (Time) (Seller's Signature) (Date) (Time)

DOCUMENT RECEIPT

State law requires Broker to furnish Buyer and Seller with copies of this Contract bearing all signatures. (Fill in applicable section below.)

A. I acknowledge receipt of a final copy of the foregoing Contract bearing all signatures.

(Buyer's Signature) (Date) (Buyer's Signature) (Date)

June Skollingsberg

1-26-05

(Seller's Signature) (Date) (Seller's Signature) (Date)

B. I personally caused a final copy of the foregoing Contract bearing all signatures to be [ ] faxed [ ] mailed [ ] hand delivered on _____ (Date), postage prepaid, to the [ ] Seller [ ] Buyer.

Sent/Delivered by (specify) _____

THIS FORM APPROVED BY THE UTAH REAL ESTATE COMMISSION AND THE OFFICE OF THE UTAH ATTORNEY GENERAL.
EFFECTIVE AUGUST 5, 2003. IT REPLACES AND SUPERSEDES ALL PREVIOUSLY APPROVED VERSIONS OF THIS FORM.

ADDENDUM NO. One
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN [X] ADDENDUM, [ ] COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of Jan 24, 2005, including all prior addenda and counteroffers, between John Spellings Beth as Buyer, and [illegible] as Seller, regarding the Property located at [illegible]. The following terms are hereby incorporated as part of the REPC:

1. this contract is contingent upon court approval. if it is not approved by court buyer / seller may cancel the contract providing written notice. Earnest money shall be returned to buyer at that point.

2. Buyer acknowledges that section 10.2 of REPC is void.

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [X] REMAIN UNCHANGED [ ] ARE CHANGED AS FOLLOWS: _____

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [ ] Buyer shall have until 8:00 [ ] AM [X] PM Mountain Time on Jan 24, 2005 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

[X] Buyer [ ] Seller Signature — 1/26/05 (Date) — 1745 (Time)

[ ] Buyer [ ] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[ ] ACCEPTANCE: [ ] Seller [ ] Buyer hereby accepts the terms of this ADDENDUM.

[X] COUNTEROFFER: [ ] Seller [X] Buyer presents as a counteroffer the terms of attached ADDENDUM NO. 2

(Signature) — 1-26-05 (Date) — 7:00 p.m. (Time)

(Signature) (Date) (Time)

[ ] REJECTION: [ ] Seller [ ] Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time)

(Signature) (Date) (Time)

ADDENDUM NO. Two
TO
REAL ESTATE PURCHASE CONTRACT

THIS IS AN [X] ADDENDUM [ ] COUNTEROFFER to that REAL ESTATE PURCHASE CONTRACT (the "REPC") with an Offer Reference Date of January 25, 2005 including all prior addenda and counteroffers, between June Skollingsberg as Buyer, and _____ as Seller, regarding the Property located at 251 E 1700 S, Salt Lake City, Salt Lake County, UT 84115. The following terms are hereby incorporated as part of the REPC:

1. Purchase price to be $212,500

BUYER AND SELLER AGREE THAT THE CONTRACT DEADLINES REFERENCED IN SECTION 24 OF THE REPC (CHECK APPLICABLE BOX): [X] REMAIN UNCHANGED [ ] ARE CHANGED AS FOLLOWS:
Buyer acknowledges and accepts an existing home will Inv Ahead Thru 3-13-05

To the extent the terms of this ADDENDUM modify or conflict with any provisions of the REPC, including all prior addenda and counteroffers, these terms shall control. All other terms of the REPC, including all prior addenda and counteroffers, not modified by this ADDENDUM shall remain the same. [X] Seller [ ] Buyer shall have until 8:00 [ ] AM [X] PM Mountain Time on January 26, 2005 (Date), to accept the terms of this ADDENDUM in accordance with the provisions of Section 23 of the REPC. Unless so accepted, the offer as set forth in this ADDENDUM shall lapse.

June D. Skollingsberg 1/26/05 1300

[X] Buyer [ ] Seller Signature (Date) (Time) [ ] Buyer [ ] Seller Signature (Date) (Time)

ACCEPTANCE/COUNTEROFFER/REJECTION

CHECK ONE:

[X] ACCEPTANCE: [X] Seller [ ] Buyer hereby accepts the terms of this ADDENDUM

[ ] COUNTEROFFER: [ ] Seller [ ] Buyer presents as a counteroffer the terms of attached ADDENDUM NO _____

1-26-05 7:00 P.M.

(Signature) (Date) (Time) (Signature) (Date) (Time)

[ ] REJECTION: [ ] Seller [ ] Buyer rejects the foregoing ADDENDUM.

(Signature) (Date) (Time) (Signature) (Date) (Time)

Complaint
dated September 3, 2003

COMPLAINT